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No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as
Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PRAIRIE BAND OF POTAWATOMI INDIANS, plaintiff,	)	
vs.	)	Case No. 99-4071-DES
KARLA PIERCE, Secretary of the Kansas Department of Revenue, State of Kansas, in her official capacity, defendant.	)	

AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Feb. 8, 2000)

COMES NOW the plaintiff, Prairie Band of Potawatomi Indians, by and through its legal counsel, and states as follows:

1. The District Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c). The defendant resides in this district, a substantial part of the events or omissions giving rise to the claim occurred in this district, and a substantial part of the property that is the subject of the action is situated in this district.

3. The plaintiff asserts claims arising under the United States Constitution and under federal law, including the Indian Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution, the Kansas Act

for Admission § 1, other federal law and comity. The District Court also has supplemental jurisdiction over any claim deemed a state law claim pursuant to 28 U.S.C. § 1367(a) because any such claims would be so related to the plaintiffs federal claims that they form part of the same case or controversy under Article III of the United States Constitution.

4. A. The plaintiff, Prairie Band of Potawatomi Indians (the "Nation") is a federally-recognized and sovereign Indian Tribe maintaining government-to-government relations with the United States and having a governing body duly recognized by the Secretary of the Interior. See Federal Register: October 23, 1997 (Vol. 62, No. 205). The Nation's 121 square mile reservation near Mayetta, Kansas, is Indian country of the Nation within the meaning of 18 U.S.C. § 1151(a). On its reservation, the Nation has sovereign governmental power, which includes the authority to enact civil laws, including tribal taxation laws. The Potawatomi Nation brings this action on its own behalf, and on behalf of it members, all of which are referred to as the Nation.

B. The Nation has never consented to civil jurisdiction by the State of Kansas over its reservation. The state motor fuel tax laws do not apply to the Nation with respect to motor fuel sold by it on its reservation.

C. The Nation has a federally recognized and supported interest in exercising its powers of sovereign self government, which includes the taxation of motor fuel transactions on its reservation. The Nation has an interest in seeking to prevent the defendant's infringement and impairment of its self government activities through the defendant's adverse actions within or outside

of its reservation with regard to motor fuel sold on its reservation and with regard to the tribal taxation of such motor fuel or the Nation's ability and right to operate a retail motor fuel business.

5. Pursuant to the Indian Gaming Regulatory Act (25 U.S.C. §2701 *et seq.*), the Nation currently owns and operates a casino complex on its reservation on U. S. trust land near Mayetta, Kansas. The Nation also operates a tribally-owned convenience store and gas station (the "Nation Station"), which is located on U.S. trust land on 150th Road between P and Q Road and from which the Nation is making retail sales of motor fuel. Both the casino and the Nation Station are located in Indian Country for purposes of 18 U.S.C. §1151.

6. A. The defendant Karla Pierce is sued in her official capacity. She is charged with the enforcement of the Kansas motor fuel taxation laws that are the subject of this complaint, including K.S.A. 79-3408. Secretary Pierce supervises the entire Kansas Department of Revenue under K.S.A. 75-5101(a).

B. The defendant construes the Kansas motor fuel tax laws to require tax remittance and reporting for all motor fuels sold or delivered to the Nation for retail sale by it on its reservation, and the defendant intends to enforce such laws accordingly against the Nation and/or the persons from whom it obtains motor fuel, including Davies Oil Company. The defendant construes and will attempt to enforce the Kansas tax laws to require the collection of Kansas motor fuel taxes with respect to the motor fuel obtained by the Nation and sold at the Nation Station. Such construction is consistent with her interpretation of the state motor fuel tax laws.

7. A. Under tribal law, the Nation is required to impose and is imposing tribal taxes on retail motor fuel sales at the Nation Station pursuant to PBP Tribal Code §§ 10-6-1 et seq. Under PBP Code § 10-6-7, the tribal motor fuel taxes collected with respect to these motor fuel sales on the reservation are required by tribal law to be used by the Nation for the purpose of constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.

B. Through its Tax Commission, the Nation has the capacity to carry out its interest in self-government through the enforcement of the tribal tax laws in PBP Code Title 10, including tribal motor fuel taxes.

8. The tribal motor fuel tax revenue from the Nation Station and from other sources generates important tax revenue for the Nation's government. Such revenues enable the Nation to provide essential governmental services to its reservation. These tribal governmental services include road and bridge construction and maintenance, law enforcement services, fire protection, environmental protection and zoning services, and social welfare and other government services. The generation of tax and operating revenues from the Nation Station and the provision of tribal government services are the foundation of the self-governance, self-sufficiency and economic development of the Nation and its reservation.

9. A. The defendant's enforcement of the state motor fuel tax laws with respect to fuel obtained by the Nation and sold by it at retail on its reservation has a direct and substantial adverse impact on the Nation. The defendant's enforcement the state motor fuel tax laws with respect to such motor fuel will subject the Nation to the

injury and interference of being only able to obtain motor fuel at a price which makes it difficult or impossible to impose and collect the tribal motor fuel tax and which makes it difficult or impossible to operate the Nation Station on the reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

B. The defendant's actual and threatened imposition or collection of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it on the reservation infringes upon the Nation's sovereign right to impose and collect tribal motor fuel taxes, infringes upon the Nation's sovereign right to finance and provide essential government services for the reservation, infringes upon the Nation's sovereign right to self-government and self-determination and infringes upon the Nation's right to conduct business and to economically develop its reservation.

10. A. The Act for the Admission of Kansas into the Union § 1 provides that nothing contained in the Kansas constitution respecting the state's boundary shall be construed to impair the rights of person or property pertaining to the Nation or its reservation.

B. Prior to, at the time of, and after the enactment of the Act for Admission § 1 through the current date, the Nation has had the fundamental sovereign right to impose tribal taxes on reservation transactions and to engage in commercial business on its reservation.

C. Contrary to the Act for Admission §1, the defendant's actual and threatened imposition or collection of Kansas motor fuel taxes upon the Nation or its

suppliers with respect to motor fuel obtained by the Nation and sold by it on the reservation impairs the Nation's sovereign right to impose and collect tribal motor fuel taxes, impairs the Nation's sovereign right to finance and provide essential government services for the reservation, impairs the Nation's sovereign right to self-government and self-determination and impairs the Nation's right to conduct business and to economically develop its reservation.

D. Under the facts of this case and with respect to the state's motor fuel taxes, the Act for Admission § 1 prohibits the Nation's reservation from being considered within the territorial boundaries of the State of Kansas. Accordingly, motor fuel which is delivered to the Nation's reservation for retail sale by the Nation is exempt from state taxation under K.S.A. 79-3408(d)(1) and the Act for Admission §1.

11. A. The Kansas motor fuel tax laws are unenforceable against the Nation if the state's interest in enforcing its laws is outweighed by the tribal and federal interests involved. Under the facts and law of this case, the federal and tribal interests in imposing the tribal motor fuel taxes and being able to operate the Nation Station outweigh the interest of the State of Kansas in imposing its motor fuel taxes, and there is no federal law to the contrary. The tribal and federal interests in tribal self government support the Nation's taxation of motor fuel sold at the Nation Station without such fuel also being subjected to the destructive effects of state motor fuel taxes. The state interest supports a state exemption for the motor fuel sold on the Nation's reservation. K.S.A. 79-3408(d)(1) already provides an exemption for motor fuel sold or delivered to other states, territories or foreign

nations. The state of Kansas does not impose its motor fuel tax with respect to fuel delivered for retail sale in other states or in Canada or Mexico.

12. The state motor fuel tax laws unduly discriminate against the Nation. They unduly discriminate by extending exemptions to all other jurisdictions and not to the Nation under circumstances where the state tax unlawfully impairs and infringes upon the Nation's rights and the state interest in imposing the tax is outweighed by the federal and tribal interests.

13. On December 17, 1998, the U.S. District Court of Kansas, Judge Dale E. Saffels, issued a Decision by the Court and Memorandum and Order in *Sac and Fox et al. v. LaFaver,* Case No. 95-4152-DES. In the Decision by the Court it was ordered that:

> " . . . the State of Kansas is permanently enjoined from enforcing Kan. Stat. Ann. § 79-3408 and collecting taxes from distributors on the sale of motor vehicle fuel in all transactions involving the federally recognized Indian tribes who are Nations to this action."

In the Memorandum and Order, Judge Saffels ruled that Kansas motor fuel taxes can not be imposed "on any and all transactions involving the sale of motor-vehicle fuels to all federally recognized Indian tribes which in turn sell the fuel as a retailer on reservations and trust land located within the state of Kansas." p. 22. *Sac & Fox* observed that the Indian Tribes "operate retail gas stations on their reservations, and assess tribal taxes on their motor-fuel sales." p. 2. *Sac & Fox* held under the balancing test for federal preemption of state law that the tribal interests outweighed the state's interests and, therefore, that "the

tax in question must be invalidated as it relates to transactions involving tribal retailers." p. 20-22.

14. Under the particular facts of this case, a preliminary and permanent injunction should be issued for the Nation.

15. This complaint requests prospective declaratory and injunctive relief. Under the circumstances of this case, the State of Kansas does not have sovereign immunity under the Eleventh Amendment to the U.S. Constitution or otherwise.

FIRST CLAIM FOR RELIEF
[Declaratory Judgment, 28 U.S.C. § 2201]

16. The Nation restates and incorporates by reference all of the allegations otherwise set forth in this complaint.

17. The Nation has filed this complaint in order to prevent the defendant's ongoing violation of federal law by attempting to impose Kansas motor fuel taxes with regard to motor fuel obtained by a sovereign Indian government and sold by it at retail on its Indian reservation. This complaint requests prospective declaratory relief through judicial determinations which include the following paragraphs 18 through 22 and any other related determinations.

18. The Nation possesses the sovereign power and authority, under the Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination, the Act for Admission of Kansas § 1 and other federal law, to enact tribal motor

fuel tax laws with respect to motor fuel delivered or sold on its reservation.

19. The Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination, the Act for Admission of Kansas §1, comity, and other federal law a) guarantee and authorize the Nation to impose tribal motor fuel taxes with respect to motor fuel delivered or sold on its reservation and b) prohibit the application or enforcement of the Kansas motor fuel tax laws with respect motor fuel sold by the Nation at the Nation Station because such state taxes i) infringe upon and impair the Nation's sovereign right to impose and collect tribal motor fuel taxes, ii) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for the reservation, iii) infringe upon and impair the Nation's sovereign right to self-government and self-determination and iv) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation.

20. The Indian Commerce Clause of the U.S. Constitution, the Nation's sovereign right of self-government and self-determination and other federal law prohibit the application or enforcement of the Kansas motor fuel tax laws with respect to motor fuel sold by the Nation at the Nation Station because the federal and tribal interests in imposing the tribal motor fuel taxes and in the Nation being able to operate the Nation Station outweigh the interest of the State of Kansas in imposing its motor fuel taxes, and there is no federal law to the contrary.

21. The defendant is without jurisdiction or authority to impose Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail

on its reservation. The state's motor fuel taxes are prohibited by federal law and are void to the extent they purport to subject this motor fuel to such taxes.

22. Any effort by defendant to enforce Kansas motor fuel tax statutes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation would constitute an act in excess of defendant's authority and any authority that the State of Kansas could confer.

WHEREFORE, the Nation prays as hereinafter set forth.

SECOND CLAIM FOR RELIEF
[Preliminary and Permanent Injunction,
Fed. R. Civ. P. 65]

23. The Nation restates and incorporates by reference all the allegations otherwise set forth in this complaint.

24. This complaint requests prospective preliminary and permanent injunctive relief in order to prevent the defendant's ongoing violation of federal law by applying or enforcing the Kansas motor fuel tax laws with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation.

25. For purposes of the preliminary injunction, the imposition, liability for, reporting, collection, and remittance of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation will cause it material and irreparable harm by depriving it of tribal tax and operating revenue necessary for it to perform essential governmental functions.

26. Neither the defendant nor the State of Kansas will suffer material damage by the issuance of a preliminary injunction. The issuance of this injunction is in the public interest given the Nation's likelihood of success on the merits.

27. A permanent injunction which prohibits the imposition, liability for, reporting, collection, and remittance of Kansas motor fuel taxes with respect to motor fuel obtained by the Nation and sold by it at retail on its reservation is proper because such actions violate the Act for Admission §1, the U.S. Constitution, other federal law, comity and the Nation's sovereign right of self government and self determination.

WHEREFORE, the Nation prays as follows:

1. That the court enter a declaratory judgment as set forth in paragraphs 17 through 22 herein.

2. That the court preliminarily and permanently enjoin the defendant from enforcing its state motor fuel taxes, including those under K.S.A. 79-3408, and from collecting such taxes from the Nation or its distributors with respect to motor fuel transactions or events involving motor fuel obtained by the Nation and sold by it at retail on its reservation.

3. That the court award the Nation its cost of suit and attorneys fees from the defendant to the extent authorized by law.

4. That the court grant the Nation such other relief as the court may deem proper.

/s/ David Prager, III
David Prager, III, KS# 10090
16281 Q Road
Mayetta, Kansas 66509
(785) 966-4030
(785) 966-4086 (fax)
Attorney for the plaintiff

The plaintiff hereby designates Topeka, Kansas as the place for trial within the District of Kansas for the above-captioned complaint.

/s/ David Prager, III
David Prager, III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 1

AFFIDAVIT OF JAMES POTTER

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, James Potter, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Treasurer and Tax Commissioner of the Prairie Band Potawatomi Nation. I am also a council member of the Nation's Tribal Council. I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation and of the Nation's relationship with the State of Kansas.

2. A. The Nation has generated significant on-reservation value by financing, constructing and owning its 35 million dollar casino on its reservation. The Nation furnished 100% of the construction cost. The casino is located on reservation U.S. trust land and is operated under the Indian Gaming regulatory Act (25 U.S.C. §2701 *et seq*.) The Nation receives 100% of the net revenues from the casino. The Nation oversees the management of its

casino. A significant number of the casino's employees are the Nation's tribal members or their family members.

By building the casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. This has created a market for the Nation Station's products. The casino has generated the substantial market value of bringing consumers to the Nation Station to buy its products. The Nation Station's retail fuel business exists because of the flow of vehicle traffic to and from the casino and because of other reservation-related vehicle traffic, not because the Nation Station is selling fuel at less than fair market prices or marketing a state tax exemption.

B. The Nation has generated additional value by financing and constructing the Nation Station and its facilities for the unloading, storage, dispensing and monitoring of gasoline and diesel motor fuel. The Nation Station is a tribally-owned and operated convenience store and gas station. The Nation Station is located on 150th Road between P and Q Road on the same U.S. trust land as the casino.

3. A. The tribal motor fuel taxes paid by the Nation Station is expended by the Nation through its Road and Bridge Department to perform the governmental functions of constructing and maintaining roads, bridges and rights-of-way on and near the Nation's reservation. This is required by PBP Code § 10-6-7, which states that:

> "All tribal motor fuel tax revenue imposed and collected hereunder shall be used by the Prairie Band Potawatomi Nation's government for the purpose of constructing and maintaining roads,

> bridges and rights-of-way located on or near the Reservation."

B. The tribal fuel taxes from the Nation Station and from other sources generates important tax revenue for the Nation's government. These taxes enable the Nation to provide essential governmental services to its reservation.

C. The Nation's tribal government provides the majority of the overall governmental services for the Nation Station, its Indian and non-Indian customers and the reservation as a whole. These tribal governmental services include road and bridge construction and maintenance, law enforcement, fire protection and emergency medical, child care, education, zoning, environmental protection, tribal court and many other government services. Many of these tribal government services are also provided to the company that distributes motor fuel to the Nation Station.

4. The indirect burden of the state tax falls on the Nation's retail fuel business and interferes with the Nation's self-government right of tribal taxation. The defendant's attempted enforcement of the state fuel tax has a direct and substantial adverse impact on the Nation Station and the Nation. The Nation Station's cost of fuel with the state tax imposed would destroy its business and would make it impossible for the Nation to collect tribal fuel taxes from it. The higher retail prices that the Nation Station would be forced to charge if the state tax were imposed would put it out of business.

The application or enforcement of the Kansas motor fuel tax laws with respect motor fuel sold by the Nation at the Nation Station would (a) infringe upon and impair the

Nation's sovereign right to impose and collect tribal motor fuel taxes, (b) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for its reservation, (c) infringe upon and impair the Nation's sovereign right to self-government and self-determination and (d) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

5. A. The defendant's enforcement of the state motor fuel tax laws is discriminating against the Nation. The defendant is discriminating by attempting to tax fuel delivered to the Nation's jurisdiction but not taxing fuel delivered to state, foreign or other taxing jurisdictions or territories.

B. The state motor fuel taxation laws also discriminate against the Nation by causing the payment of 40.5% of the state motor fuel tax collections to non-tribal local government while paying nothing to the Nation's tribal government. See K.S.A. 79-34,142, 79-3425 and 79-3425c. This discrimination is particularly unfair because the Nation is paying for most of the road and bridge maintenance and construction on its reservation.

6. As a policy matter, the State of Kansas does not have a material state interest in imposing its motor fuel taxes with respect to fuel delivered to the Nation's reservation. The State has an historical policy interest in not imposing state tax with respect to fuel delivered to Indian reservations. In the early 1990's, Kansas Governor Finney agreed that the State should relinquish any state tax

authority with respect to the Nation's reservation. Governor Finney also agreed that if the Nation was imposing its own tribal taxes, the State should not seek to impose its taxes. (See attached copy of this Compact, dated January 10, 1992.) The State has a policy that motor fuel should not be subject to double taxation. (See also K.S.A. 79-3424 and K.S.A. 79-3408(d)(1).) The state also has the policy of not taxing motor fuel which is delivered to other jurisdictions or territories under K.S.A. 79-3408(d)(1).

7. Motor fuel has been continuously delivered to the Nation Station for retail sale since at least September 30, 1999. The Kansas Department of Revenue, through its employees, who are under the defendant's direct or indirect supervision, has contacted the Nation's fuel supplier and issued assessments against the supplier to attempt to force it to pay the state fuel tax for the fuel that is being delivered to the Nation Station.

8. The Nation and its members on the reservation pay Jackson County real property taxes with respect to reservation fee land to pay a portion of the school, fire district, law enforcement costs.

Further affiant sayeth not.

/s/ James Potter
James Potter

Subscribed and sworn to before me this 21st day of December, 2000.

/s/ Theresa J. Kitchkommie
Notary Public

Theresa J. Kitchkommie
NOTARY PUBLIC
State of Kansas
My Appt. Expires
08-27-02

TAX COMPACT BETWEEN
THE PRAIRIE BAND OF POTAWATOMI INDIANS
AND THE STATE OF KANSAS

This Compact is made this 10th day of January, 1992, by and between the Prairie Band of Potawatomi Indians (hereinafter the "Tribe") and the State of Kansas (hereinafter the "State"):

Whereas, The Tribe is a federally recognized Indian tribe, duly-organized pursuant to the Constitution and By-Laws of the Prairie Band of Potawatomi Indians, approved by the Secretary of the Interior on February 19, 1976, as amended thereafter, and

Whereas, both the Tribe and the State recognize the duty of each to negotiate with the other on a government-to-government basis pursuant to our national Indian policy of economic, social and political self-determination for Indian tribes; and

Whereas, the Supreme Court has repeatedly recognized the inherent sovereign power of Indian tribes to

impose and collect taxes upon businesses operating within their reservation boundaries; and

Whereas, it is agreed between the Tribe and the State that it is to their mutual benefit to cooperate in matters relating to taxation; and

Whereas, the Legislature of the State of Kansas has authorized tax collection agreements between the State and Indian tribes to eliminate problems which result from tribal and state taxation and regulation of the same event or transaction, and to ensure a reasonable competitive balance of sales by vendors on reservations and those off reservations;

Now therefore, the Tribe and the State agree as follows:

1. Definition of Terms. As used in this Compact each of the following terms shall have the following meaning, unless the context clearly indicates a different meaning:

(a) "Reservation" means all Indian country as defined by 18 U.S.C. § 1151 which is subject to the jurisdiction of the Tribe.

(b) "Excise tax" means, respectively, a tax on sales (K.S.A. 79-3601 *et seq.*); a tax on cigarettes (K.S.A 79-3301 *et seq.*); a tax on motor fuels (K.S.A. 79-3401 *et seq.*); a tax on special fuels (K.S.A 79-3474 *et seq.*); tax on special fuels (K.S.A. 79-3474 *et seq.*); and a tax on tobacco products (K.S.A. 79-3370 *et seq.*); and any of the foregoing five taxes established by tribal law.

(c) "Local option tax" means any tax imposed by a Kansas county upon any transaction occurring

on the Reservation or upon any other product or activity upon the Reservation.

2. State Taxes Not to be Imposed. No state excise tax or local option tax shall be imposed upon any transaction with a non-Indian purchaser which occurs on the Reservation while the Tribe shall have in effect and shall actively impose, collect and enforce upon any such transaction, an excise tax of not less than sixty percent (60%) of the rate of such state excise tax for each such excise tax included within the definition of that term in subsection 1(b) of this Compact.

3. Proof of Tribal Tax Ordinance. Such tribal tax shall be deemed to be enacted only when a copy of the tribal tax ordinance, together with a fully executed copy of the enacting resolution of the Tribal Council, is filed with the Tribal Secretary; within ten (10) days thereafter, a copy of the tribal tax ordinance and an executed copy of the enacting resolution of the Tribal Council shall be filed with the Department of Revenue.

4. Tribal Contribution to Banner Creek Reservoir Project. The Tribe agrees to pay to Jackson County a tribal contribution to the Banner Reservoir Project in the sum of $16,000.00 per annum.

5. Violation of Tribal Tax Law; Enforcement of Penalties for Violations.

(a) Notice of Probable Violation to Tribal Council. Whenever it shall come to the attention of the Director of Revenue that any person is probably conducting business on the Reservation without collecting and remitting tribal taxes as required by this Compact, the Director shall notify the Tribal Council

of such violation and of the need for tribal enforcement of tribal penalties for such violation in Tribal Court of such offender either civilly or, in case such person is an enrolled member of any Indian tribe, civilly or criminally or both, as the Tribal Council may determine.

(b) Enforcement of Penalties for Violations in Tribal Court. At any time it deems a violation of tribal tax laws to have occurred, or within thirty (30) days of receipt of any such notice of violation from the State, the Tribal Council shall file an action in Tribal Court to enforce tribal penalties against such person either civilly or criminally or both, as the Tribal Council may determine.

(c) State Inspection of Tribal Tax Records. In such enforcement action in Tribal Court, all tribal tax records with respect to pertinent transactions on the Reservation involving the person against whom tribal penalties are being enforced shall be made evidence of the Tribal Court and as such shall be open to inspection by the State at any time.

6. Terms of Relinquishment of State Jurisdiction. The State hereby relinquishes whatever jurisdiction it may have to impose and collect excise taxes as herein defined from any merchant upon any transaction with a non-Indian purchaser which occurs on the Reservation, subject to the following conditions:

(a) Such merchant shall be authorized to do business on the Reservation pursuant to applicable tribal law;

(b) Such merchant shall pay such corresponding excise taxes to the Tribe; and

(c) Such excise taxes imposed and collected by the Tribe shall be not less than sixty percent (60%) of corresponding excise taxes imposed by the State on any such transaction outside the Reservation.

7. Term of Compact Renewal. The term of this Compact shall be for a term of five (5) years from the effective date hereof; provided, however, that this Compact shall be renewable for additional five (5) year terms by mutual consent of the Tribe and the State as follows:

(a) Periodic Review. The provisions of this Compact shall be subject to review at five (5) year intervals dating from the effective date of this Compact One hundred eighty (180) days prior to the expiration of any such five (5) year term, either party to this Compact may notify the other of provisions which it believes require review or amendment. Such notice shall be in writing and shall be sent by certified mail to the Chairman of the Tribe, the Governor of the State or any other appropriate governmental official of either.

(b) Notice of Need to Resolve Issues. Upon receipt of such notice by either party, the parties shall engage in good faith efforts to resolve the issues identified in the notice. The parties shall have the balance of the 180-day period within which to negotiate. The Tribe and State may agree to extend the 180-day period without prejudice to the rights of either party.

(c) Termination for Failure to Resolve Issues. In the event the parties are unable to resolve the issues identified in the notice within the balance of the 180-day period or any extension thereof, upon the expiration of such period, this Compact shall terminate.

(d) Termination for Substantial Breach. Either party may terminate this Compact upon a substantial breach by the other party regardless of any other provision of this Compact. Upon identification of what either party believes to be a substantial breach of the terms of this Compact, such party shall notify the other party in writing, via certified mail, return receipt requested, as to the nature of the substantial breach. The party issuing such notice shall refrain from terminating this Compact until 30 days have elapsed from receipt of such notice by the other party.

8. Tribal Sovereign Immunity Not Waived. Nothing contained in this Compact shall be deemed to waive the sovereign immunity of the Tribe to suit in any court, state or federal.

9. Effective Date. This Compact shall be binding and effective only after it has been approved by the Governor of Kansas, and the Tribe by written resolution of the Tribal Council; the last such date shall be the effective date hereof.

Witness our hand and seal this 10th day of January, 1992.

/s/ Mark Beshears
Mark Beshears, Director
Department of Revenue

/s/ George Wahquahboshkuk
George Wahquahboshkuk,
Chairman
Prairie Band of Potawatomi
Indians Tribal Council

/s/ Grace Wahwassuck
Grace Wahwassuck,
Secretary

Approved:

/s/ Joan Finney
Joan Finney
Governor of Kansas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 2

AFFIDAVIT OF CHRISTOPHER C. PFLAUM

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

I, Christopher C. Pflaum, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I have been retained as an expert witness by the Prairie Band Potawatomi Nation (the "Nation") for its proceeding pending in the U.S. District Court for Kansas, Case No. 99-4071-DES. I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation and of the Nation's relationship with the State of Kansas.

2. I have prepared my Expert Report dated June 27, 2000 (the "Report"), a copy of which is attached and incorporated herein by reference. I have read the Report and am familiar with the contents thereof, and the facts and opinions set forth therein are true and correct to the best of my knowledge, information and belief.

Further affiant sayeth not.

/s/ CC Pflaum
Christopher C. Pflaum

Subscribed and sworn to before me this 26TH day of November, 2000.

[SEAL]

/s/ Judy C. Conn
Judy Conn
Notary Public

United States District Court For The District of Kansas

Prairie Band of Potawatomi Indians

vs.

Karla Pierce,
Secretary of the Kansas Department of Revenue
Case No. 99-4071-DES

Expert Report of

Christopher C. Pflaum, Ph.D.
Spectrum Economics, Inc.

June 27, 2000

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Section 1 – Qualifications and Experience:

My education, work experience, publications and speeches, and previous testimonies are detailed in the curriculum vita attached to this report as Appendix I. I have previously served and currently act as a consultant to numerous clients in a broad array of business litigation and regulatory matters. I have also, in the past, testified on tax issues before the tax authorities in both Kansas and Missouri.

My curriculum vita is provided in Appendix 1 to this report. To date, Spectrum Economics, Inc. has billed the

Prairie Band of the Potawatomi Indians approximately $8,000 on this matter.

Section 2 – Foundation For Opinions:

I have served as a consultant or testifying expert in numerous business litigation and regulatory matters, before both state and federal courts and numerous administrative agencies. My firm has rendered opinions in several cases involving convenience stores (C-stores) like Nation Station and we are generally knowledgeable regarding their operation. As a result of my formal education, prior litigation and regulatory engagements and previous work experience as a policy analyst for a government agency, I am familiar with the principles of taxation and the effect of a sales or excise tax on the demand for the product taxed as well as the ability or inability of a merchant to pass on a tax to ultimate consumers.

In preparing this report, I have relied on documents including District, Appellate and Supreme Court decisions on the issue of taxation of Indian commerce, provided by the Prairie Band of Potawatomi Indians (PBP) and its counsel, David Prager III. I also consulted several textbooks on Microeconomics and Industrial Organization. A listing of the references consulted can be found in Appendix 2 to this report.

Section 3 – Overview and Summary:

The PBP operates a casino on its reservation located on approximately 121 square miles near Mayeta, Kansas and about fifteen miles north of Topeka. Adjacent to the casino are a hotel and a C-store, the Nation Station (NS). The Nation Station is a typical modem C-store with a merchandise mix of 70% gasoline and diesel fuel, 20%

cigarettes and 10% food. The proportion of food sales is somewhat higher than average and cigarettes somewhat lower.

The PBP imposes a tribal tax on fuel sales made by the NS at a rate of 16¢ per gallon of gasoline and 18¢ per gallon of diesel fuel which is 4¢ per gallon less than the corresponding average Kansas state motor fuel tax. The state has moved to collect the state fuel tax with respect to fuel sold at the NS and the PBP has brought the instant action to prevent that collection action by the State. If the State is able to impose its tax, the Nation will not be able to impose the tribal tax and still be competitive with surrounding gasoline retailers.

There are numerous legal and economic issues which combine to determine whether a state can tax economic activities that pertain to Indian land. Some of these are purely legal issues such as aspects of the U.S. Constitution, treaties, petitions for Statehood issues and laws passed by Congress specifying the rights of Indians. Other issues are susceptible to economic analysis. Examples of such issues are questions such as whether an activity would be undertaken but for a tax exemption; whether the imposition of a tax by the State unreasonably burdens an activity taken on the reservation; and, whether the collection of a tax by the state economically interferes with the ability of a Tribe to govern itself.

Section 3.1 – Questions Posed

The PEP posed the following specific questions to Spectrum Economics:

> "1. Is the value marketed by the Nation Station's retail fuel business to its customers derived

from value generated on the reservation by activities in which the Nation has a significant interest? Is the Nation Station's on reservation value a result of its location and of the Nation's effort to supply and market the fuel?

2. Is the Nation Station marketing an exemption from state motor fuel taxation? What is the typical range of fair market prices for motor fuel? Are the Nation Station's fuel prices being set below the fair market prices in order to draw customers from surrounding areas or to give it a competitive advantage over businesses in the surrounding area? Is the Nation Station making sales to non-Indians who are traveling to it in order to take advantage of the claimed exemption from state fuel taxes? Does the market for the Nation Station's fuel products exist because of the Nation's claimed exemption from the state fuel tax?

3. In the event the state fuel tax were imposed in addition to the tribal fuel tax, what would be the effect a) on the price and demand for the Nation Stations's fuel products, b) on the value to the Nation of the Nation Station business and c) on the ability of the Nation to impose its tribal fuel tax on fuel sold on the reservation?

Would the imposition of the state tax in addition to the tribal fuel tax have a substantial adverse impact on the Nation's interests? Could the burden of the additional state fuel tax be passed on to the retail customer? Is the demand for motor fuel sufficiently elastic that the Nation Station's business would be significantly reduced to the point of being essentially eliminated if the state tax were imposed in addition to the tribal tax? Would the tribal Motor fuel tax receipts be

significantly reduced to the point of being essentially eliminated if the state tax were imposed in addition to the tribal tax? Would the imposition of the state fuel tax destroy the Nation's governmental ability to impose tribal fuel taxes with respect to fuel sold on its reservation?

Can it be concluded that the ultimate economic burden of the state motor fuel tax falls on the Nation?

4. Does the economic burden of the state motor fuel tax substantially interfere with the Nation's internal ability to raise tribal taxes in order to finance the tribal government function of constructing and maintaining roads and bridges on the reservation? Is there a direct conflict between the state and tribal motor fuel tax schemes? Will the Nation's governmental system of motor fuel taxation be rendered ineffective and of little value if the enforcement of the state motor fuel taxes is permitted to continue?"[1]

In preparing this report, we have recast these questions into economic terms. We cannot comment on the legal issues inherent in them but we can address them as a matter of economics.

Section 3.2 – Conclusions

It is my expert opinion that:

- The demand for gasoline is highly elastic in the relevant market and that the Nation does not have the market power to impose its tax

[1] Letter from David Prager III to Christopher C. Pflaum, June 9, 2000.

in addition to the Kansas tax. Were it to try and do so, the Nation Station would sell virtually no gasoline or diesel fuel. Hence, if the State is successful, the Tribe will not be able to collect its tax on motor fuel sales on the reservation.

- The Nation Station is part of the economic infrastructure of the reservation and its customer base is comprised of visitors to the Nation's gaming operations, non-resident reservation workers and residents of the reservation. By virtue of its location and lack of nearby highway advertising, NS does not seek to nor does it compete for fuel purchases from those who would not otherwise be on the reservation.
- Because the Nation sets its fuel tax at approximately the same level as that of the State of Kansas, it is not establishing a competitive advantage for Nation Station by virtue of not collecting the State of Kansas tax.
- Furthermore, the Nation is not "marketing a tax exemption" because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market.
- Motor fuel taxes are user fees which are designed to collect revenues to build and maintain roads and are generally reserved for these government functions. The fuel tax imposed by the Nation is similarly earmarked for construction and maintenance of reservation roads. These activities completely utilize that tax and Nation fuel tax monies are not permitted to be used for any other purpose.

If the State is allowed to collect its tax, the Nation will be unable to collect its tax and the road construction and maintenance program of the Nation will suffer which will, in turn, impair the Nation's governmental plans to serve the reservation. Alternatively, the Nation will have to divert general funds to road construction and maintenance which will cause it to reduce its expenditures on other governmental programs and projects. This will impair the ability of the Nation to govern itself.

- The State of Kansas returns a portion of the state fuel taxes its [sic] collects to local communities. The State also funds construction of roads, highways and intersections throughout the state. The State of Kansas does not provide such aid to the Nation for the construction and maintenance of reservation roads. At present, the Nation's fuel tax is the only source of tax funds for these governmental operations.

Section 4.0 – Analysis of NS Operation:

Though I do not have legal training, the cases involving taxation with respect to commercial enterprises operated on Indian lands do consider economic principles which underlie recent decisions. The science of economics assists in making taxation decisions since they are inherently economic in nature.

It is my understanding that, as a general principle, state taxation of tribal commerce may be construed to interfere with tribal self-government. However, state taxation has been permitted in some cases where the Indian enterprise

is "marketing a tax exemption" by selling a product to non-Indians who would, but for the lower price resulting from a tax exemption, buy elsewhere. In other words, if the "raison d'etre" for the business is a tax exemption that allows the Indian operation to prosper at the expense of competitors because it can sell a product such as cigarettes or gas for less, state taxation may be permitted. The question of whether a state tax is permitted also considers the extent to which the state or the tribe provides a service that is linked to the tax, such as road construction funded from fuel taxes. Here the legal analysis parallels the classic "free rider" problem found in the economic literature.

In this Section, I discuss the economics of the Nation Station operation and the funding of PBP government activities. I compare the NS to the reservation "smoke shops" and other activities that the courts have found are not exempt from state taxation.

Section 4.01 – Nation Station Location and Operation

The Nation Station is a modem 8400 square foot convenience store constructed for the PBP at a cost of $1.4 million located adjacent to the PBP gaming operations operated by Harrah's. It is approximately two miles from the nearest highway (US 75) and is not visible from the highway nor is there any indication on the highway of NS's existence, prices, etc. From a locational standpoint, NS is poorly situated compared to a typical C-store, especially to market motor fuels to travelers on the adjacent highway. C-stores are typically located on a highway with "easy on-easy off" access and have easily readable signage advertising the pricing of fuel and/or cigarettes.

The NS also does not have the number of pumps that one typically finds at a dedicated fuel outlet; it has a single canopy with four two-sided pumps which can accommodate a maximum of eight automobiles and one diesel island which can accommodate four trucks. The store is substantially larger than the average C-store (2500 sq ft) and does a somewhat higher dollar volume of business.

Any fuel outlet "marketing a tax exemption" will clearly appeal to the truck business. Truckers buy fuel in large quantifies and are very price sensitive. To do business with truckers, a station must be signed up with one of the major fuel card operations (Comdata, T-Chek, etc.). Nation Station is not signed up with any of these operations and does not have a Trendar or other system to take their cards as payment for diesel fuel. This being the case, the NS can not be considered a meaningful competitor in the market for fuel sales to truckers.

Clearly, NS is sited to take advantage of the traffic generated by the casino. It is located off the parking lot between the casino/hotel and the road to US 75. This is a convenient location for casino patrons and employees to stop for gas, cigarette and soft drinks on the way to or from the casino. It is not convenient to US 75 and motorists traveling that highway would be unlikely to exit solely for the purpose of buying gas. In fact, a survey done by the PBP tribal government at our request, shows that only 11% of NS customers stopped at the store for the specific purpose of buying gas. Thirty percent of customers bought no gas. Casino patrons and employees of the casino and Nation make up 73% of the NS fuel customers. The trade area of the NS is typical of a C-store, a one to two mile radius.

The NS also provides important services to residents of the reservation and reservation workers. It is the only "fast food" outlet on the reservation or within 2 miles of the government center. It serves approximately eighty meals per day to members of the Nation and reservation workers and casino workers and patrons. In addition, it is the only station owned by the Nation serving the 475 PBP members living on its 121 square mile reservation. About 11% of its fuel customers are people who work or live on the reservation, other than at the casino, and the NS also supplies fuel to the Nation's government vehicles.

The product mix of the NS is typical of a neighborhood convenience store, 70% fuel and 20% cigarettes and 10% food, snacks and other merchandise. The cigarette sales are somewhat below typical levels but this is due, in part, to the relatively high per gallon price of gasoline in the last six months which has raised the fuel share of dollar sales.

It is clear that the "value marketed" by Nation Station results from the business generated by the casino and from employees of the casino and PBP government and residents. But for the casino, there would not be enough traffic to support the C-store in its current location. The NS is a good example of what appraisers call a "location dependant business." Furthermore, the location of the C-store fits well with the economic development plans as presented in the Nation's land use plan for the reservation which forecasts the development of other commercial operations and expanded residential facilities in the eastern sections of the reservation.

Section 4.02 – Nation Station Fuel Pricing

Motor fuel is a commodity which is sold in local markets. Economic theory teaches that a given product cannot sell for different prices in the same market. By branding or value added merchandising strategies merchants can earn greater margins but the increment is small. The Nation Station faces numerous competitors past which casino customers travel and who advertise their prices in signage visible from US 75. These stations include:the Indian Country General Store at 19075 US 75 Highway (on US 75 near 190th Road) and the Indian Country Mini Mart at 20330 US 75 Highway (1½ miles north of the Indian Country General Store), both of which are in Jackson County, and the Kickapoo station and the Sac and Fox station, both of which are on US 75 just north of Jackson County in Brown County.

Because numerous competitors are situated nearby, Nation Station does not have any "market power" which would allow it to charge supra competitive prices. This competition effectively caps the pricing of motor fuel at Nation Station. Many of these stations are much larger outlets for fuel than the NS and set their prices very aggressively. Because of its convenient location relative to the casino and its food and drink offerings, NS would not loose [sic] all of its business if it charged slightly higher than market prices. However, if it charged significantly higher prices, economic theory teaches that the station would loose [sic] enough sales to make the price increase unprofitable and force the Nation Station to reduce its price back to market level. It is, therefore, impossible as a practical matter for the NS operate if both the Nation's and State's motor fuel taxes are imposed on the fuel sold there.

By policy, the NS sets its selling prices for motor fuel to be within 2¢ per gallon of the regional average. Since this price is within the range of local market prices, NS must be considered to be selling at the market price and, by definition, the tribe is not marketing a tax advantage at the NS.

Section 4.03 – "Value Added Activity"

The model of the type of Indian enterprise that has been looked upon with disfavor by the courts is the "smoke shop." State and local taxes have historically accounted for as much as one half of the cost of a pack of cigarettes; New York, for example, has a State tax of $1.18 per pack and the sales tax rate in most areas of New York State is about 8% or another 20¢ per pack.

Some Indian Nations have set up stores to sell cartons of cigarettes to non-residents. The tribes that operate these shops advertise heavily along major highways through and near their reservations often marketing their state tax exemptions with signage that displays "No State Cigarette Tax" in the advertising message. Since the stores are out-of-the-way, they would enjoy little traffic but for the substantial savings due to lack of state taxes that customers enjoy. My personal observation is that customers to these smoke shops tend to buy several weeks or more supply of cigarettes.

There is little "value added" by these operations. They do not have a merchandise mix which meets the need of travelers or other cognizable group of consumers (other than smokers). They are generally passive conduits between the wholesaler and ultimate consumers and do not add significant value to the products that they sell

through management, marketing or merchandising acumen or location.

The Nation Station is a very different value proposition. The Nation recognized that casino customers and employees travel distances, sometimes substantial distances, to get to the reservation. These travelers should be attracted to a convenient place to buy gas, snacks, drinks and cigarettes before getting on the highway. Therefore, the Nation built a modern, full-service convenience store and strategically placed it so that it was easily accessible to travelers going to and from the casino. The store is a model operation, entirely state-of-the-art in C-store layout and design. To argue that this business does not add value is to entirely dismiss the contribution of retailing to the product value proposition.

Section 5 – The Tribal Fuel Tax and Government Operation:

Indian tribes have sovereign rights, established by treaty and by federal law, the most basic of which is self-government. A fundamental element of sovereignly [sic] is the control and taxation of commerce on the sovereign's lands. Further, if the sovereign cannot tax, it cannot fund government and hence, it cannot govern.

A basic question in this matter is the extent to which the action of the State of Kansas in levying a tax on fuel sold at the NS would undermine the ability of the PBP to act as a government. In this section, I discuss the operations of the government and how the right to collect the tribal tax affects government operations.

Section 5.01 – PBP Road Construction and Maintenance

The PBP reservation outside Mayetta, Kansas is 121 square miles. At the present time, there are 212 miles of roads on and through the reservation and numerous bridges. These roads provide access to commercial and government establishments, residences of both tribal members and non-members living on reservation grounds and access to crop lands and agricultural facilities. In many respects, the reservation is a microcosm of rural Kansas – predominantly sparsely populated and criss-crossed by farm-to-market roads.

The Nation provides road and bridge construction and maintenance services on reservation property having primary responsibility for 118 miles of the 212 miles of road on the reservation. Reservation roads comprise approximately 1/6th of the roads in Jackson County and the Nation maintains almost 10% of the county's roads without any ongoing financial assistance from the county or the state.

The government of the PBP Nation carries out these responsibilities through its Road and Bridge Department which employs 32 persons, 31 of whom are Prairie Band tribal members. The department owns, operates and maintains a fleet of twenty-two pieces of road equipment including graders, scrapers, dump trucks and back hoes and a number of small trucks worth approximately $4 million. The Nation's 2000 budget for the Road and Bridge Department is almost $2 million and 80% of this budget is expended on roads and bridges (approximately twenty percent is for other construction on the reservation).

Section 5.02 – Collection and Use of Fuel Tax

The operation of the Road and Bridge department is budgeted at $1,856,486 for 2000 of which $286,000 is expected to come from tribal taxes levied on motor fuel sales at the Nation Station. This level of expenditure and tax collection is reasonable from the perspective of either the miles of road maintained or in relation to the vehicle traffic. The State of Kansas collects $450 million per year in fuel, license, sales and other taxes and fees related to motor vehicles which it uses for construction and maintenance of 133,384 miles of highways, roads and Streets. This is a total tax collection of $3,374 per mile of road. Including bond money and federal assistance, the State spends $6,700 per mile and the counties receive an additional $1,066 from the state. The Nation receives annually $2,424 per mile of road from the only tax it collects – the motor fuels tax. Like the State, the Nation spends far more than it collects in taxes. In 2000 approximately $1.6 million is budgeted for road projects and maintenance, almost $13,600 per mile of road. The Nation is not currently able to issue tags and, unlike Kansas counties that receive back from the state 40% of fuel tax revenues collected, is not eligible for state fuel tax rebates. The Nation, unlike the counties, does not receive any portion of the sales tax collected on vehicles sold to members of the PBP Tribe.

Clearly, the Nation is taking on the road construction and maintenance responsibilities that would normally fall on the State and County. This is appropriate as the Nation is a government and expects to provide standard government services to its citizens. Since excise taxes are normally earmarked to specific government service, logic and good policy suggest that the Nation should be able to collect and

retain the fuel excise taxes which support the services that it provides.

Section 6 – Conclusion:

In Section 3.1, I quoted the questions posed to me by the PBP. The results of my study of the operation of the NS yield unequivocal answers to these questions. Clearly, the value of the NS is generated by the casino and the reservation community and the Nation has a significant interest in both. Since the NS sells fuel at the market price, it cannot be charged with "marketing a tax exemption." Both logic and the results of our survey confirm these conclusions.

Basic economic theory teaches that the NS cannot charge prices high enough to allow collection of both the Kansas and PBP fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the NS fuel business to virtually zero.

Finally, since the Nation's fuel tax is earmarked for road construction and maintenance, this activity would suffer were the State of Kansas to attempt to impose its tax or other tribal governmental services would have to be reduced to continue to support the Road and Bridge Department of the Nation's government at its current level.

Christopher C. Pflaum says that he is the President of Spectrum Economics, Inc., that he has read such report and is familiar with the contents thereof, and that the

facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ CC Pflaum
CHRISTOPHER C. PFLAUM, Ph.D.
June 27, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 3

AFFIDAVIT OF RANDY CONROY

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Randy Conroy, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I have knowledge and experience of the Prairie Band Potawatomi Nation's tribal government, of its tribal tax collection activities and of the Nation Station. During 1999 and 2000 I worked in the finance department of the Nation's tribal government and provided substantial assistance in managing the Nation Station. I also assisted the Nation's Tax Commission and am familiar with the payments of tribal fuel taxes paid to the Nation and, ultimately, transferred to the tribal Road and Bridge Department.

2. A. The Nation has generated substantial additional value by actively contributing to and managing the Nation Station as an integral part of its tribal business. The Nation Station is managed by Jon Boursaw, the Nation's Executive Director, by Jim Moulden, the Nation Station's general manager, and by Randy Conroy of the Nation's finance department. All three of them and all of the Nation Station personnel are tribal government

employees. The Nation provides all of the Nation Station's personnel, accounting, financing and management.

B. As of May 25, 2000 the Nation Station employed a total of 15 persons. Eleven of the Nation Station's employees are Indian persons, with seven of them being tribal members of the Nation. The Nation Station exercises Indian preference in its employment practices.

3. Under tribal PBP Code §10-6-1 et seq., the Nation imposes and collects a tribal tax on sales of motor fuel at the Nation Station at the rate of 16 cents per gallon of gasoline and 18 cents per gallon of diesel fuel. (See PBP Code Title 10, Chapter 6, attached.) Accordingly, the Nation Station duly paid tribal fuel taxes to the Nation in the amount of $194,474.66 for the eight-month period from October 1999 through May 2000. (Copies of the Nation Station's tribal fuel tax returns for this period are attached.) At this rate, the Nation Station is subject to tribal fuel taxes of approximately $300,000 per year. These tribal fuel tax collections are used by the Nation's tribal government to maintain and improve reservation roads and bridges. Transfers of this tribal motor fuel tax paid by the Nation Station are periodically made to the Prairie Band Potawatomi Road and Bridge Department, as required by PBP Code § 10-6-7. The Nation Station is not operating in a "tax free zone."

4. The $300,000 of tribal fuel taxes paid by the Nation Station over the past year is 100% of all of the tribal fuel taxes paid to the Nation during the past year.

5. The facts stated on my attached May 25, 2000 memorandum are true and correct. Retail sales of motor fuel generate 71% of the Nation Station's revenue.

6. A copy of the following documents are attached as exhibits and are true and correct copies.

A. State of Kansas Comparison Report, The Governor's Budget Report with Legislative Authorizations, Fiscal Year 2001, cover page and p. 9.

B. Kansas Department of Revenue, 1999 Annual Report, p. 14 and 46.

C. State of Kansas Comparison Report, The Governor's Budget Report with Legislative Authorizations, Fiscal Year 2001, p. 50

Further affiant sayeth not.

/s/ Randy Conroy
Randy Conroy

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

CHAPTER 10-6
MOTOR FUEL TAX

Section 10-6-1. Tax on Motor Fuel

(A) There is hereby imposed a tax for the privilege of doing business which is measured by the sale of motor fuel within the tribal jurisdiction,

which includes, without limitation, the entire Prairie Band Potawatomi Reservation territory. This tax shall be as follows:

(1) Gasoline Motor Fuel. A tribal tax equal to 16 cents for each gallon of gasoline or gasohol sold at retail.

(2) Diesel Motor Fuel. A tribal tax equal to 18 cents for each gallon of diesel fuel sold at retail.

The effective date for the tax rates specified in this subsection shall be October 1, 1999.

(B) The retailer of the motor fuel is the taxpayer. The above taxes shall be paid by the retailer and its shall be the duty of the retailer to collect and remit the tax from the payment made by the purchaser to the retailer, to file monthly returns with the Tax Commission, and to pay to the Tax Commission the taxes that are required to be collected.

(Amended by PBP TC No. 2000-26, February 1, 2000.)

Section 10-6-2. Payment of the Tax.

(A) Every retailer shall submit to the Tax Commission within fourteen (14) calendar days after the end of each calendar month a report which states the gallons of motor fuel sold and amount of taxes due and collected during the calendar month. The monthly report shall state the name, address and telephone number of all distributors and transporters from whom the retailer has received deliveries of motor fuel and the gallons of each kind of motor fuel received.

(B) Every retailer shall pay the taxes collected or required to be collected during the calendar month to the Tax Commission at the same time as the report for the calendar month is submitted.

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: **PBP Nation Station**
Month: **Oct-99**
License #: **PBP0100**

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	74,558	x $	0.22 =		$16,402.76
Diesel	5,632	x $	0.24 =		$ 1,351.68
Totals	80,190				$17,754.44 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	80,190
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager
Signature James W. Moulden Date 1-21-00

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: **PBP Nation Station**
Month: **Nov-99**
License #: **PBP0100**

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	113,190	x $	0.22 =		$24,901.80
Diesel	8,210	x $	0.24 =		$ 1,970.40
Totals	121,400				$26,872.20 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	121,400
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager

Signature James W. Moulden Date 1-21-00

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: PBP Nation Station
Month: Dec-99
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due	
Gasoline	147,108	x $	0.22 =		$32,363.76	
Diesel	6,302	x $	0.24 =		$ 1,512.48	
Totals	153,410				$33,876.24	**

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	153,410
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name James Moulden Title General Manager

Signature James W. Moulden Date 1-21-00

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: January-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due	
Gasoline	153,401	x $	0.16 =		$24,544.16	
Diesel	5,227	x $	0.18 =		$ 940.86	
Totals	158,628				$25,485.02	**

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	158,628
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date 02/09/2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: February-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	152,802	x	$ 0.16	=	$24,448.32
Diesel	5,754	x	$ 0.18	=	$ 1,035.72
Totals	158,556				$25,484.04 **

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	158,556
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date March 7, 2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: March-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	141,250	x	$ 0.16	=	$22,600.00
Diesel	7,142	x	$ 0.18	=	$ 1,285.56
Totals	148,392				$23,885.56 **

****Please make check payable to "PBP Tax Commission" at address above**

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	148,392
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date April 6, 2000

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: April-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	116,655	x $	0.16 =		$18,664.80
Diesel	8,644	x $	0.18 =		$ 1,555.92
Totals	125,299				$20,220.72 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	125,299
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date May 8, 2000

****Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*****

Prairie Band of Potawatomi Nation
Tax Commission
16281 Q Road
Mayetta, KS (785) 966-4000

Retailers Monthly Motor Fuel Tax Return

Retailer Name: Nation Station
Month: May-00
License #: PBP0100

Fuel Type	Total Gallons Sold		Tax Rate		Motor Fuel Tax Due
Gasoline	121,848	x $	0.16 =		$19,495.68
Diesel	7,782	x $	0.18 =		$ 1,400.76
Totals	129,630				$20,896.44 **

**Please make check payable to "PBP Tax Commission" at address above

Fuel Distributors used during reporting month:

	Name	Address	Phone #	Gallons Received
1.)	Davies Oil	Troy, KS 66087	(785) 985-3553	129,630
2.)				
3.)				

I certify that this is a true, complete, and accurate return for the period stated above:

Printed Name Jim Moulden Title General Manager

Signature Jim Moulden Date June 5, 2000

Motor Fuel Tax Reports are due the 14th calendar day after the end of each month. Failure to submit timely reports will result in penalties as defined in the Potawatomi Law and Order Code Chapter 10-6*

[LOGO]

MEMORANDUM

TO: Jon Boursaw, Executive Director

FROM: Randy Conroy, Accountant

DATE: May 25, 2000

At the request of David Prager, I have compiled the following information concerning PBP Nation Station Convenience Store:

Total Cost of Construction:	$1,384,421.00
Total Tribal Motor Fuel Tax: Paid since opening (9/30/99):	$ 152,278.22
Fuel Sales as % of Total Revenues:	70.7%
Total Employees at C-Store (5/25/00):	15
Total Tribal Members Employed at C-Store:	7
Other Native Americans Employed At C-Store	4

If you need further information concerning the PBP Nation Station, please give me a call.

[SEAL]

STATE OF KANSAS

Comparison Report

The Governor's Budget Report with Legislative Authorizations

FISCAL YEAR 2001 /s/ Bill Graves

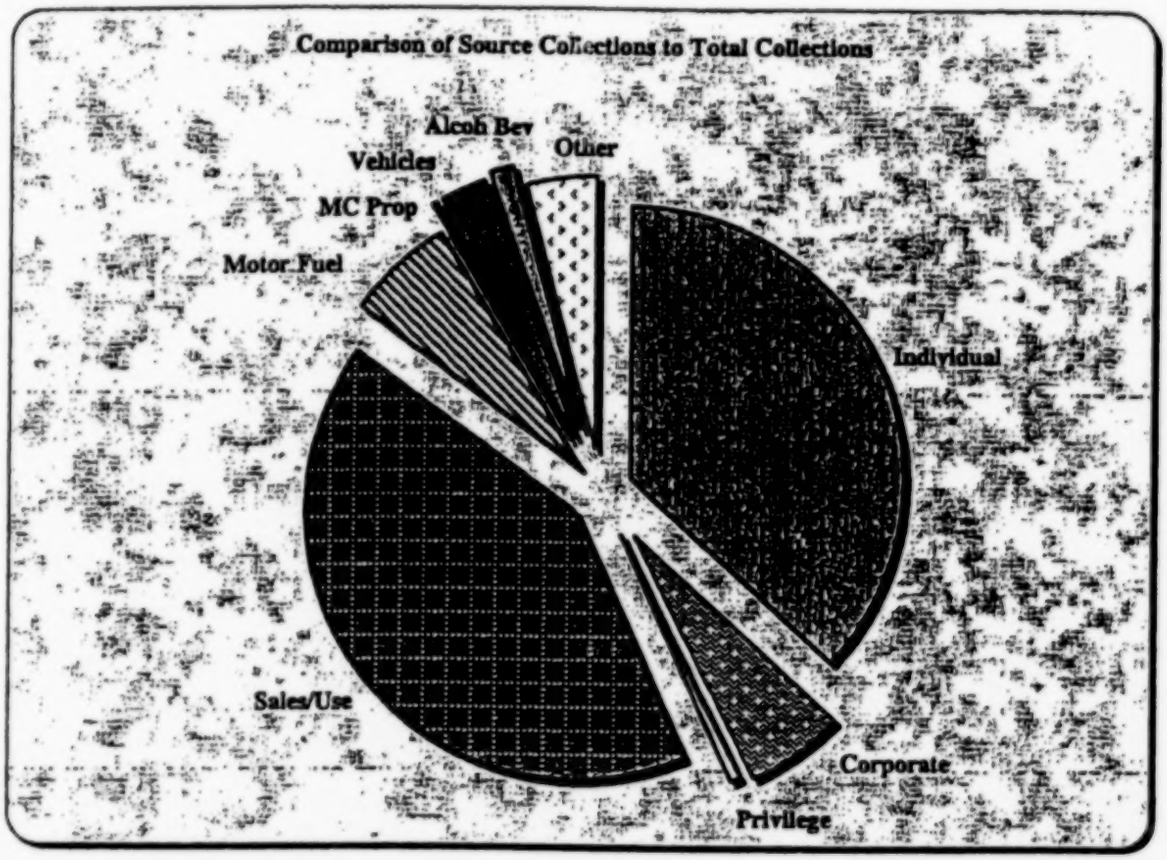
BILL GRAVES, GOVERNOR

Budget Summary for All Funding Sources

(Dollars in Thousands)

	FY 1999 Actual	FY 2000 Approved	FY 2001 Approved
Beginning Balances	$ 1,516,885	$ 1,375,079	$ 1,615,020
Add: Released Encumbrances	4,472	833	–
Net Receipts			
State General Fund:			
Motor Carrier Property Taxes	15,771	17,000	17,000
Income Taxes	1,947,367	2,075,000	2,178,900
Inheritance Taxes	81,859	64,000	65,000
Excise Taxes	1,762,419	1,834,700	1,911,172
Other Taxes	69,305	64,000	62,438
Other Revenue	101,706	107,295	186,754
State General Fund Total	$ 3,978,428	$ 4,161,995	$ 4,421,264
Special Revenue Funds:			
Property Taxes Dedicated to Building Funds	$ 30,055	$ 30,933	$ 32,198
Motor Fuels Taxes	322,588	360,815	367,609
Motor Vehicle Registration Taxes	133,595	131,000	132,000
Sales Tax Dedicated to Highway Fund	85,889	89,516	93,011
Agency Service Charges	392,905	581,331	592,620
Licenses, Permits, and Registrations	65,626	65,558	65,883
Lottery Ticket Sales	109,330	198,909	200,000
Sale of Goods and Services	244,020	239,740	250,737
Interest, Dividends, Rents, & Royalties	138,164	144,856	145,138
Federal Grants	2,088,945	2,212,578	2,294,360
Non-federal Gifts, Donations, & Grants	66,872	69,691	66,791
Other Revenue	80,210	78,419	83,861
Non-revenue Receipts	423,519	384,071	436,973
Special Revenue Funds Total	$ 4,181,717	$ 4,587,416	$ 4,761,180
Total Receipts	$ 8,160,145	$ 8,749,411	$ 9,182,444
Total Available	$ 9,681,502	$ 10,125,323	$ 10,797,464
Expenditures by Object			
Salaries & Wages	1,619,983	1,678,030	1,733,048
Contractual Services	621,787	648,563	639,798
Commodities	132,153	132,755	137,318
Capital Outlay	311,837	127,068	118,658
Debt Service	68,220	78,557	118,449
Non-expense Items	155,922	36,223	11,942
Aid to Local Governments	2,977,511	3,134,482	3,213,049
Other Assistance, Grants, & Benefits	2,062,737	2,151,689	2,273,828
Capital Improvements	512,196	549,159	554,544
Total Expenditures	$ 8,306,423	$ 8,500,303	$ 8,788,693
Ending Balances	$ 1,375,079	$ 1,625,020	$ 2,008,771

Total Department of Revenue Collections by Source



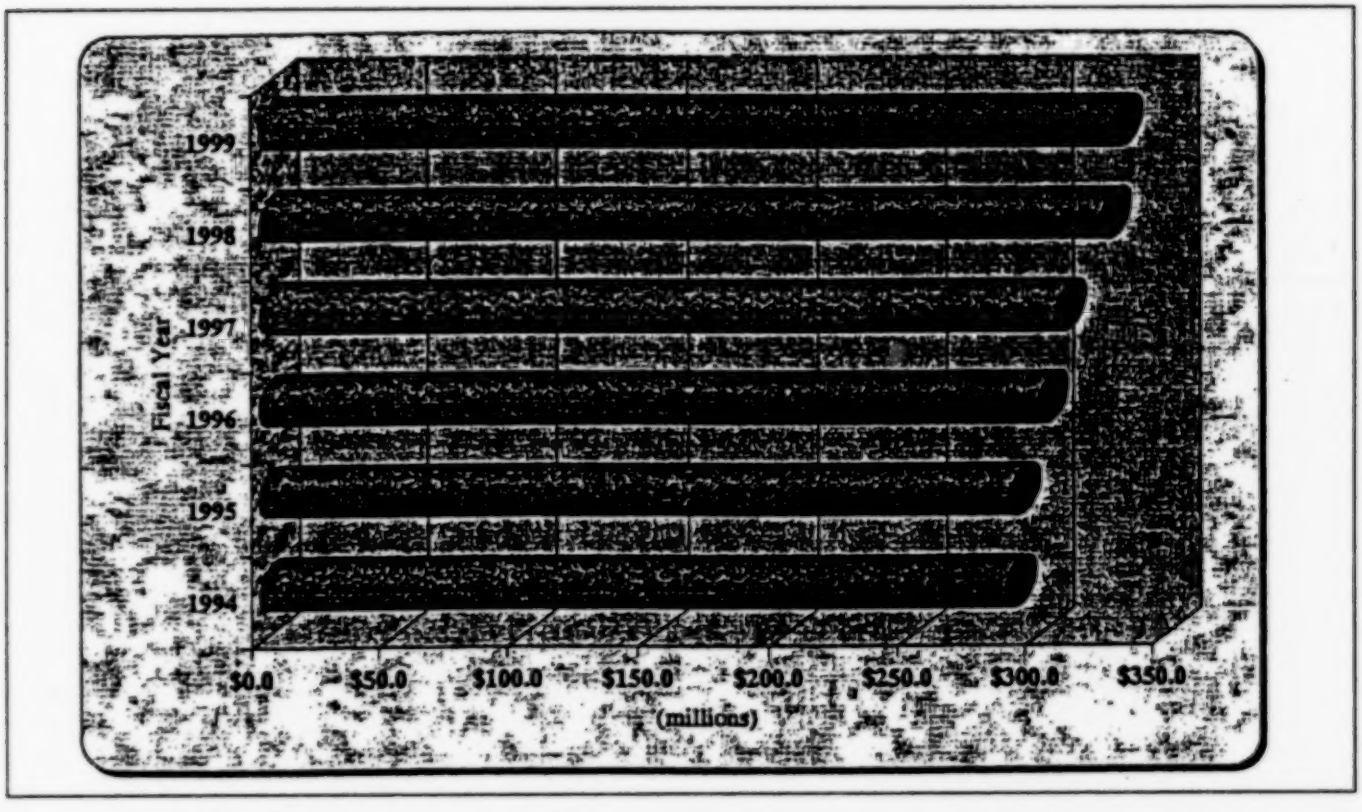
Source	Fiscal Year 1998	Fiscal Year 1999	Percent Change	Percent of FY 1999 Total
Individual Income Taxes	$1,914,147,211	1,925,832,156	0.6%	37.1%
Corporate Income Taxes	$323,802,321	$295,004,023	-8.9%	5.7%
Privilege Taxes	$26,502,579	$29,315,745	10.6%	0.6%
State and Local Sales and Use Taxes	$2,082,952,547	$2,165,821,461	4.0%	41.7%
Motor Fuel Taxes	$326,475,626	$331,151,050	1.4%	6.4%
Property Taxes: Motor Carrier	$16,168,829	$16,047,959	-0.7%	0.3%
Division of Vehicles	$130,605,367	$148,925,316	14.0%	2.9%
Alcoholic Beverage Control	$68,285,486	$72,284,737	5.9%	1.4%
Other Taxes and Fees	$237,423,348	$210,363,761	-11.4%	4.0%
Total	$5,126,363,314	$5,194,746,208	1.3%	100.0%

Other taxes and fees include: transient guest; cigarette; tobacco; controlled substances; estate; minerals; gas, oil and sand royalties; car line; bonds; licenses; and fees.

BEST AVAILABLE COPY

Motor Fuel Tax Gross Collections

On July 1, 1993, the point of taxation on special fuels was moved from the retail/user level to the wholesale distributor level. July 1, 1995 marked the start of the Governor's fuel tax evasion project aimed at reducing fuel tax evasion in Kansas. The 1999 Legislature approved increases in motor fuel taxes beginning July 1, 1999, cumulating to a total increase of $0.04, which will continue until July 1, 2020.

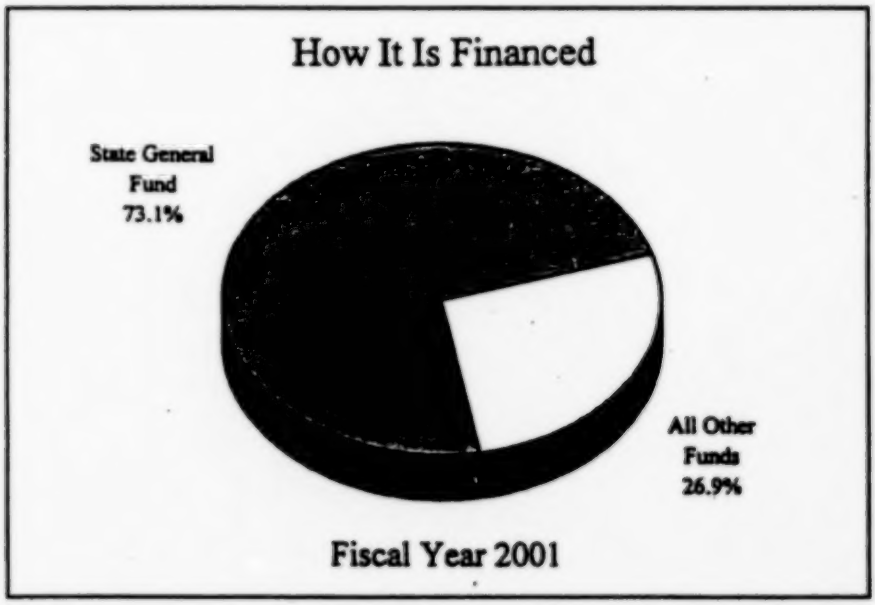


Fiscal Year	Gross Collections	Percent Change
1994	$289,021,917	6.4%
1995	$290,618,527	0.6%
1996	$301,600,919	3.8%
1997	$308,592,688	2.3%
1998	$326,475,626	5.8%
1999	$331,151,050	1.4%

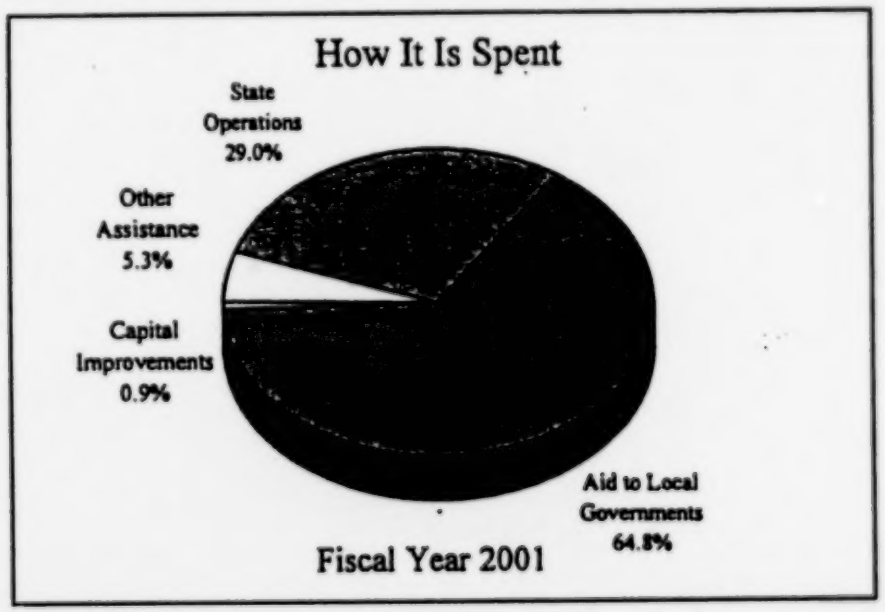
Education Summary

The Education function includes expenditures for state support of primary, secondary, and higher education. Agencies in this function are the board of Regents and the institutions under its jurisdiction; the Department of Education, including the Schools for the Deaf and blind; the Kansas public Employees Retirement System (that portion reflecting administration of retirement programs for school employees and the payment of local school employer contributions); the State Treasurer (that portion financing university bond debt service payments); the State Historical Society; the Kansas Arts Commission; and the State Library.

Total appropriations for education agencies in FY 2000 were $3,979,912,515, of which $2,896,612,762 is from the State General Fund. The appropriations for FY 2001 include $4,059,077,602, of which $2,966,522,475 is from the State General Fund. The FY 2001 amounts represent increases of 2.4 percent from the State General Fund and 2.0 percent from all funding sources over the previous year.



Elementary & Secondary Education. The Governor recommended a variety of increases in spending for elementary and secondary education of FY 2001. The Legislature agreed with the Governor in most cases and authorized a few additional expenditures. State General Fund expenditures for general state aid increase by $29.0 million in FY 2001, as demonstrated by the table on the next page. School districts will receive $3,820 in base state aid for each pupil, an increase of $50 from FY 2000. This additional $50 in the base will cost approximately $28.7 million in FY 2001. These expenditures assume a weighted FTE enrollment of 573,762 in the 2000-2001 school year. Despite a shortfall in State General Fund revenues, the Governor and Legislature fully funded the current year base state aid, also an increase of $50 per pupil, from the previous year.



The Legislature concurred with the Governor in expanding the four-year-old at-risk program by $1.0 million. This money from the children's Initiatives Fund will benefit 436 additional children. The Legislature also added monies for various programs, outlined below; however, the Legislature

did not agree with the Governor on funding the Kan-Ed Infrastructure and removed the $4.5 million which was recommended from the children's Initiatives Fund from this budget.

Several new programs were funded by the Legislature, as embodied in 2000 SB 432. Under the new mastery of Basic Skills Program, the board of Education will prepare a strategy for identifying, developing, and implementing a mastery of basic reading skills programs for kindergarten through grade three. In order to accomplish this, the Board was given $25,000 from the State General Fund. This bill also requires persons offered employment by a school district to submit to a criminal history check at the district's cost. The bill also establishes a mentor teaching program in the 2001-2002 school year. Trained mentor teachers will provide new teachers with support and assistance.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 4

AFFIDAVIT OF PAUL FENDER

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Paul Fender, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I currently perform full-time planning and construction services for the Prairie Band Potawatomi Nation (the "Nation"). I have performed services for the Nation as a construction consultant since 1996 and I am familiar with the Nation Station's construction and operations.

2. A. The total construction cost of the Nation Station was $1.5 million. The approximate construction cost of the Nation Station's motor fuel handling system for the unloading, storage, dispensing, measuring and environmental monitoring of gasoline and diesel motor fuel was over $250,000.

B. The fuel that is delivered to the Nation Station must be unloaded, stored, dispensed, measured and monitored before it can be sold. Because the fuel is highly flammable and capable of causing environmental damage, expensive tank storage and fuel handling and monitoring systems must be used by the Nation Station to make the fuel available to its customers.

3. The County and State have been substantially benefited by the Nation taking responsibility for the majority of the roads and bridges on and near the reservation. The Nation not only maintains a majority of the reservation roads but it also has improved and now maintains many off-reservation roads. The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1½ miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection. These improvements provide motor vehicle transportation access to the Nation Station and the Nation's casino. The Nation has the ongoing and future obligation to maintain this stretch of roadway access to the casino and the Nation Station.

4. The Nation itself paid for the 1997-1998 improvements to the U.S. 75 Highway and 150th Road intersection and for the improvements from the highway to its casino and the Nation Station. Therefore, the Nation, and not the State, paid for these access roads to the Nation's casino, the Nation Station and the reservation

Further affiant sayeth not.

/s/ Paul Fender
Paul Fender

Subscribed and sworn to before me this 21st day of December, 2000.

/s/ Theresa J. Kitchkommie
Notary Public

Theresa J. Kitchkommie
NOTARY PUBLIC
State of Kansas
My Appt. Expires
8-27-02

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 5

AFFIDAVIT OF JON BOURSAW

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Jon Boursaw, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Executive Director of the Prairie Band Potawatomi Nation (the "Nation"). I have personal knowledge of the Nation and its governmental operations and laws, of the operations of the Nation Station, and of the operation and effect of the state motor fuel tax laws being asserted by the Kansas Department of Revenue with regard to fuel sold by the Nation Station on the Nation's reservation.

2. A. By building its casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. This has created a market for the Nation Station's products. The casino has generated the substantial market value of bringing consumers to the Nation Station to buy its products. The Nation Station's retail fuel business exists because of the flow of vehicle traffic to and from the casino and because of other reservation-related vehicle traffic, not because the Nation Station is selling fuel at less than fair market prices or marketing a state tax exemption. The retail price

for motor fuel at the Nation Station is generally set at the fair market price based upon competing prices of other motor fuel retailers in northeast Kansas. (See my attached March 2, 2000, letter to Jim Moulden.)

B. The Nation has generated value by financing and constructing the Nation Station and its facilities for the unloading, storage, dispensing and monitoring of gasoline and diesel motor fuel. The Nation Station is a tribally-owned and operated convenience store and gas station. The Nation Station is located on 150th Road between P and Q Road on the same U.S. trust land as the casino.

C. The Nation has generated substantial additional value by actively contributing to and managing the Nation Station as an integral part of its tribal business. The Nation Station is managed by Jon Boursaw, the Nation's Executive Director, by Jim Moulden, the Nation Station's general manager, and by Randy Conroy of the Nation's finance department. All three of them and all of the Nation Station personnel are tribal government employees. The Nation provides all of the Nation Station's personnel, accounting, financing and management.

D. As of May 25, 2000, the Nation Station employed a total of 15 persons. Eleven of the Nation Station's employees were of Indian descent, with seven of them being tribal members of the Nation. The Nation Station exercises Indian preference in its employment practices.

3. A. The Nation's tribal government provides the majority of the overall governmental services for the Nation Station, its Indian and non-Indian customers and the reservation as a whole. These tribal governmental

services include road and bridge construction and maintenance, law enforcement, fire protection and emergency medical services, child care, education, zoning, environmental protection, tribal court and many other government services. These tribal government services are also provided to the company that distributes motor fuel to the Nation Station.

B. The Nation's Fire and Emergency Medical Services Department provides fire protection, EMS first response and ambulance services for the Nation Station, its customers and all other persons on and near the reservation. In 2000 the Nation has expended or will expend $2,062,697 for these services. In 1999, the Nation expended in excess of $590,000 to pay for these services. (See attached Fire Department, Jan.-March 2000 quarterly report and budget (1999 actual and 2000 budgeted). In addition to all these expenditures, the Nation is expending $1.2 million for a special capital project to build a new fire station on K Road on the reservation between 158th and 150th Roads, which will be completed in 2001. The Tribe has mutual aid agreements with several local fire districts under which it provides fire control services to all persons on and near the reservation.

C. The Nation's government is expending over $1.0 million annually on education. The Nation's Child Care and Head Start program provides child care and early childhood development services for both Indians and non-Indians on the reservation. In 2000 the tribal expenditures for these services will be $760,798. These services are carried on principally in the Ben-no-tteh (child's house) Wigwam building, which can serve up to 74 children and employs roughly 20 tribal employees. The Nation also provides other education services for the reservation

through its Education Department, which will expend $317,547 for this purpose in 2000.

D. The Nation's Department of Planning and Environmental Protection generally provides environmental protection, zoning and land use planning regulation services for the Nation Station and all other persons on and near the reservation. In 2000 the tribal expenditures for these services will be roughly $400,000. In addition, watershed planning services of this Department include the study and management watershed resources on and near the reservation. Its land use planning services have included planning and advising on the U.S. 75 Highway Corridor Study, which includes highway usage both on and near the reservation. (A true and correct copy of the Prairie Band Potawatomi Land Use Plan excerpt, cover and pages 42-43 is attached.)

E. With respect to the casino, the Nation Station and the reservation as a whole, the Nation is currently providing the majority of overall government services for its reservation.

For each tribal government department, the 1999 actual and 2000 budgeted operating expenditures by the Nation to perform these services are as follows:

Tribal Department:	1999 Actual	2000 Budget
Alcohol and Drug Treatment	$58,853	$79,269
Attorney	77,208	192,100
Building Maintenance	287,610	257,015
Child Care Center	317,149	760,798
Community Health	80,275	138,760
Community Service Program (See Social Serv.)	54,003	122,136
USDA Food Distribution	31,304	45,662
Education (higher, adult vocational & adult)	343,149	317,547
Election Board	62,799	77,168
Enrollment	74,788	136,754
Finance Department (1999 est.)	400,000	463,969
Fire and Emergency Medical Services	591,314	2,062,697
General Administration (1999 est.)	350,000	414,440
Grant Writing	0	48,021
Human Resources	239,073	360,380
Johnson O'Malley (for education)	17,373	70,198
Land Management	246,770	416,073
Language Preservation	71,045	106,000
Law Enforcement	681,803	1,107,690
Motor Vehicles	0	53,380
Planning and Environmental Protection	400,000	400,000
Road and Bridge	1,665,707	1,856,485
Senior Citizens	145,320	199,975
Social Services	46,676	382,034
Tribal Court	103,721	314,904
Youth Program	65,536	169,358
TOTAL Tribal Government Expenditures	$6,411,476	$10,552,813

The total for these tribal government services in 2000 which benefit the Nation Station and the reservation as a whole is over $10.5 million. (A copy of the Jan.-Mar. 2000

quarterly report and budget (1999 Actual and 2000 budgeted) is attached for each of these departments.) These figures do not include tribal government capital expenditures for special projects. It is expected that the Nation's 2001 and future tribal government operating expenditures will at least equal or exceed those for 2000.

F. The tribal fuel tax revenue from the Nation Station and from other sources generates important tax revenue for the Nation's government. This tax revenue enables the Nation to provide essential governmental services to its reservation. These tribal governmental services include road and bridge construction and maintenance, law enforcement, fire protection, emergency medical, environmental and zoning services, and social welfare and other government services. The generation of tribal taxes from the Nation Station and the funding of tribal government services with them are an integral part of the self-governance, self-sufficiency and economic development of the Nation and its reservation.

5. The indirect burden of the state tax falls on the Nation's retail fuel business and interferes with the Nation's self-government right of tribal taxation. The defendant's attempted enforcement of the state fuel tax has a direct and substantial adverse impact on the Nation Station and the Nation. The Nation Station's cost of fuel with the state tax imposed would destroy its business and would make it impossible for the Nation to collect tribal fuel taxes from it. The higher retail prices that the Nation Station would be forced to charge if the state tax were imposed would put it out of business.

The application or enforcement of the Kansas motor fuel tax laws with respect [sic] motor fuel sold by the

Nation at the Nation Station would (a) infringe upon and impair the Nation's sovereign right to impose and collect tribal motor fuel taxes, (b) infringe upon and impair the Nation's sovereign right to finance and provide essential government services for its reservation, (c) infringe upon and impair the Nation's sovereign right to self-government and self-determination and (d) infringe upon and impair the Nation's right to conduct business and to economically develop its reservation. The Nation's governmental system of motor fuel taxation will be rendered ineffective and of little value if the defendant's enforcement of the state motor fuel taxes is permitted to continue.

Further affiant sayeth not.

/s/ Jon Boursaw
Jon Boursaw

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

[LOGO] Government Center
16281 Q Road • Mayetta, Kansas 66509
Ph. (785) 966-2255

March 2, 2000

Jim Moulden
The Nation Station
12285 150th Road
Mayetta, KS 66509

Re: Operations of the Nation Station.

Dear Mr. Moulden:

I have analyzed the operations [sic] the Nation Station since it opened in October of 1999. In order to maintain an adequate level of profitability, the Nation Station will need to increase its motor fuel prices to approximate this region's fair market prices. From this date forward, you are directed to sell gasoline and diesel fuels at prices equivalent to the fair market prices for which these fuels are being sold in northeast Kansas by retailers in general. The fair market price is any price within a range no more than 2 cents above or below the average price in northeast Kansas, as you may determine, from your observations of other motor fuel retailers.

As you may know, the Nation has enacted a tribal motor fuel tax in order to fund tribal government operations. This tax is 16 cents per gallon for gasoline and 18 cents per gallon for diesel fuel. Please work with the Nation's Tax Commission to assure proper reporting and payment of these motor fuel taxes to the Nation.

If you have any questions, please give me a call.

Very truly yours,

/s/ Jon Boursaw
Jon Boursaw, Executive Director
Prairie Band Potawatomi Nation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 6

AFFIDAVIT OF TIM RAMIREZ

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Tim Ramirez, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the Director of the Road and Bridge Department of the Prairie Band Potawatomi Nation (the "Road and Bridge Department"). I have held this position for 18 years and have been directly involved in the design, engineering, construction and maintenance of roads and bridges on the reservation during this time. I am familiar with the road and bridge construction projects on and near the reservation.

2. The Road and Bridge Department provides most of the reservation road and bridge construction and maintenance for the Nation's 121 square mile reservation. These reservation roads provide customer and employee access to commercial and government establishments, access to the residences of both tribal members and non-members living on the reservation and access to crop lands, allotment lands and agricultural facilities. The Nation's Road and Bridge Department provides these government services throughout the reservation and

currently has responsibility for 118 miles of the 212 miles of roads on the reservation.

The number of road miles for which the Nation is responsible has steadily grown from 63 miles in 1996 to roughly 118 miles at present. The tribal government recognized the lack of proper road maintenance on the reservation and has taken on this responsibility. From 1997 to the current date, the Road and Bridge Department has also constructed seven tribal bridges on the reservation. The Nation maintains these roads and bridges with no ongoing financial assistance from the County or the State. In addition to servicing these 118 miles of roads, the Nation also has provided funds and materials to the County to help it maintain and improve other roads on the reservation.

3. For 1997 through 2005, the Nation's Road and Bridge Department has expended and will expend roughly $29,000,000 for constructing and maintaining roads and bridges on and near the reservation. This is an average of over $3.0 million per year. (See Summary of Actual and Planned Expenditures for the Tribal Road and Bridge Department for 1997-2005.)

4. The Nation not only maintains a majority of the reservation roads but it also maintains off-reservation roads near the Nation Station. The Nation maintains off-reservation roads near the Nation Station that are part of the Indian Reservation Road System, including 150th Road from P Road to U.S. 75 Highway, 158th Road from Q Road to U.S. 75 Highway, 162nd Road from Q Road to U.S. 75 Highway and Q Road from 158th Road to 162nd Road.

5. The Nation's Road and Bridge Department employs 32 persons, 31 of whom are Prairie Band tribal members. The department owns, operates and maintains a fleet of twenty-two pieces of road equipment including graders, scrapers, dump trucks and back hoes and a number of small trucks worth approximately $4 million.

6. In performing tribal government services, the Nation's Road and Bridge Department expended in excess of $1.6 million in 1999 and will expend over $1.8 million in 2000. For the current 2000 year, I have attached a copy of the Road and Bridge Department's Quarterly Report dated April 15, 2000. It describes our activities. The 1999 and 2000 budgets do not include all of the Nation's special road and bridge construction capital project expenditures.

7. A. The Nation has special project plans in the immediate future to make significant improvements and to pave seven miles of reservation roads with asphalt. On October 17, 2000, the Nation signed a contract and will pay roughly $275,000 to its engineers for design, engineering and construction work for this project. (See attached October 17, 2000 Agreement for Professional Services for the 2000 Road Reconstruction Project between Bartlett and West Engineers, Inc, and the Prairie Band Potawatomi Nation.) The additional expected cost for the construction of this project in 2001 is estimated at $1,925,000.

B. As part of its ongoing, special road reconstruction projects, the Nation anticipates that during the period of 2000 through 2005 its Road and Bridge Department will improve and pave 30 of [sic] miles of reservation roads as follows:

Year	Reservation Road Miles	Roads planned to be improved and saved	Nation's Expected Cost
2001	7	See attached map, yellow code.	$1,925,000
2002	5	See attached map, green code.	1,375,000
2003	7	See attached map, blue code.	1,925,000
2004	6	See attached map, orange code.	1,650,000
2005	5	See attached map, pink code.	1,375,000
Total Expected Cost @ $275,000/mile:			$8,250,000

(See attached Prairie Band Potawatomi Roadway Improvement Map, 2000-2004. The map is almost one year out of phase because the Nation decided to delay these projects for more extensive reengineering and reconstruction of the reservation roads using federal design standards.)

The total expected cost to the Nation for these special road reconstruction projects is $8,250,000.

8. In addition to the above special projects, the Nation has agreed to finance significant costs for a project to improve the off-reservation intersection at 150th Road and U.S. 75 Highway. The Nation has signed a written agreement to pay roughly $450,000 of tribal funds to subsidize additional improvements to this intersection. The Nation will be financing the engineering, right of way and utility relocation costs for this project. (See attached Cooperative Agreement dated December 8, 1999.)

10. The tribal motor fuel tax revenue paid by the Nation Station has been used by the Nation's Road and Bridge Department to help finance our governmental functions of constructing and maintaining roads, bridges and rights-of-way on or near the Nation's reservation, as required by PBP Code §10-6-7.

11. The statements made on my attached April 15, 2000 letter are true and correct.

12. A. Mr. Lackey's affidavit is inaccurate and misleading in many respects. It is my understanding that the system enhancement improvements near the reservation are only for the U.S. 75 Highway and 150th Road intersection. Their total costs for this single, one-time project are $5,000,000 and not the $13,796,612 figure stated in Mr. Lackey's affidavit, ¶6. (See attached Cooperative Agreement dated December 8, 1999.) The State's share of these expenditures should not generally be attributed to the Nation's reservation when they are being made for many other reasons unrelated to the reservation and their proportional benefit to the reservation is relatively small after payment of the tribal $450,000 share.

B. The 1992-1994 improvements to U.S. 75 Highway between Topeka and Holton were principally made during those years to widen the high speed, limited access U.S. 75 Highway from two to four lanes. This U.S. 75 Highway is a major north-south highway having the principal purpose of providing a roadway for through auto and truck traffic. It is misleading for Mr. Lackey to suggest that the 1992-1994 expenditures should be attributed to the Nation's reservation. These expenditures should not generally be attributed to the Nation's reservation when they were made for many other reasons unrelated to the reservation and their proportional benefit to the reservation is relatively small.

C. The portions of U.S. 75 Highway which Mr. Lackey discusses in his Affidavit do not provide highway access to the casino or Nation Station. Access is provided by 150th Road.

D. The State receives a large amount of federal highway money and it is misleading for Mr. Lackey to suggest that all of the financing for state road projects comes from the State.

13. In my opinion, Mr. Bruns has not been "instrumental" in reservation road and bridge construction and maintenance given the fact that the Nation's Road and Bridge Department is the primary government agency that conducts these activities on the reservation.

Further affiant sayeth not.

/s/ Tim Ramirez
Tim Ramirez

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

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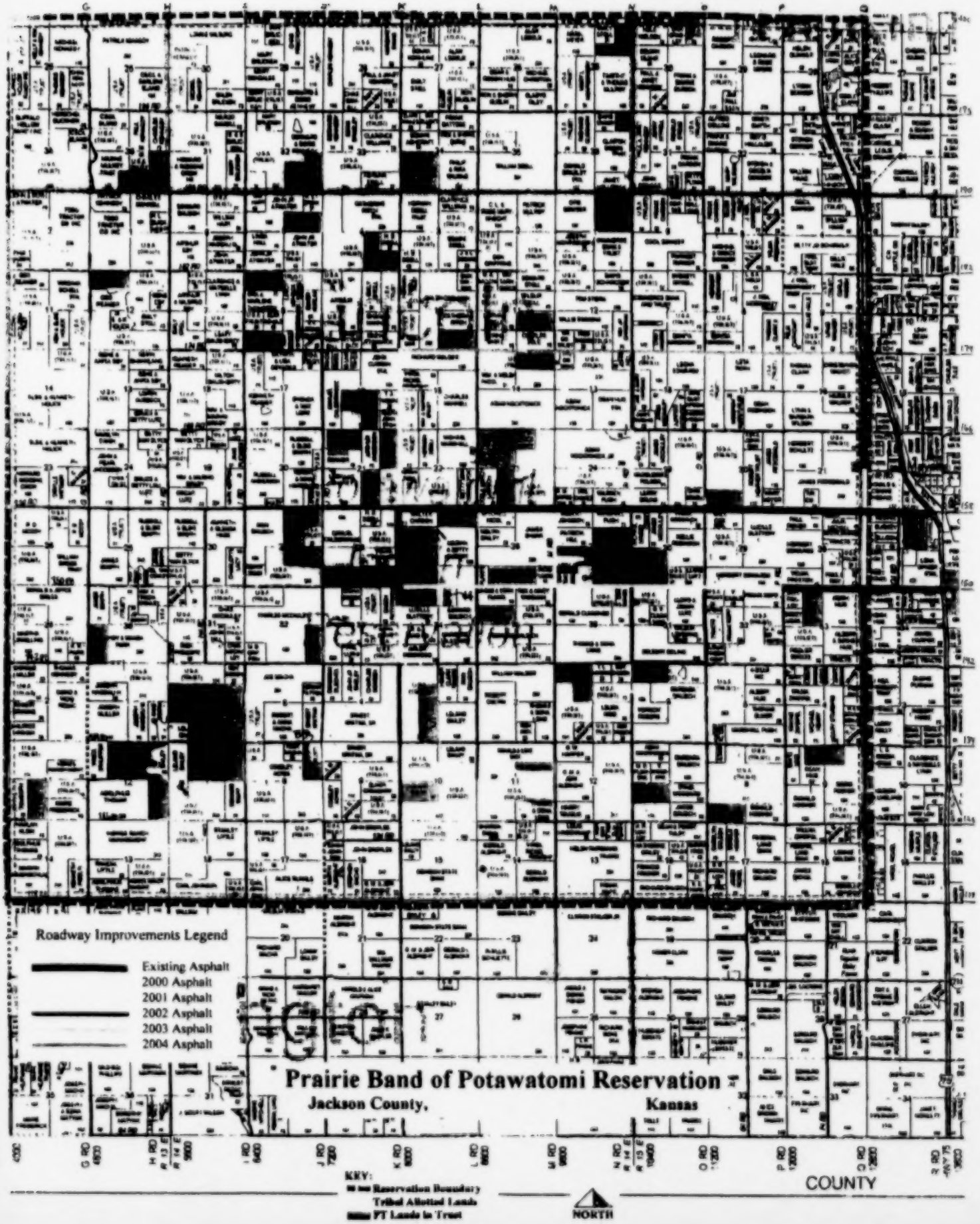

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 99-4071-DES

[Caption Omitted In Printing]

Plaintiff's Ex. 9

AFFIDAVIT OF JIM MOULDEN

STATE OF KANSAS)
) ss:
COUNTY OF JACKSON)

I, Jim Moulden, of lawful age and having been first duly sworn, swear and affirm under oath as follows:

1. I am the store manager of the Prairie Band Potawatomi's Nation Station and have been in this position from September 1999 to the present.

2. The Nation Station's fuel prices are set at fair market. Soon after it was opened, the Nation Station was "directed to sell gasoline and diesel fuels at prices equivalent to the fair market prices for which these fuels are being sold in northeast Kansas by retailers in general." Consequently, the Nation Station sells its motor fuel products at fair market prices.

3. The Nation Station generally advertises that it has "competitive prices" for fuel. At one time it had a single billboard sign that advertised the "lowest gas prices around." This was intended to convey the message, consistent with its general business practice in ¶2, that the Nation Station also attempts to meet the fuel prices of the other two retailers on the reservation. At any one time, the actual fuel prices of the Nation Station may be higher or lower than the other two retailers, depending in large part

on the cost that the Nation Station pays to obtain the fuel and the prices of other retailer's in northeast Kansas.

4. The statements made in my attached June 26, 2000 letter to Dr. Pflaum are true and correct.

Further affiant sayeth not.

/s/ Jim Moulden
Jim Moulden

Subscribed and sworn to before me this 20th day of December, 2000.

/s/ Linda Tecumseh
Notary Public

LINDA TECUMSEH
NOTARY PUBLIC
State of Kansas
My Appt. Expires
10-12-2004

Prairie Band Potawatomi Nation

Nation Station
12285 150th Road
Telephone: (785) 966-2719 Fax: (785) 966-2987

June 26, 2000

Dr. Christopher Pflaum
Spectrum Economics. Inc.
40 Corporate Woods, Suite 360
9401 Indian Creek Pkwy.
Overland Park, KS 66210

Re: Prairie Band Potawatomi Indians v. Pierce, Case No. 99-4071-DES, motor fuel tax litigation.

Dear Dr. Pflaum:

This letter provides you with some information in writing about the Nation Station. The Nation Station first opened for business on September 30, 1999. The Nation Station is a modern 8400 square foot convenience store located adjacent to the Nation's casino. We sell gasoline and diesel fuel and other products that are typical for a convenience store. Prices for gasoline and diesel fuel are set at the Nation Station in accordance with Mr. Boursaw's March 2, 2000 letter to me, a copy of which is attached.

The Nation Station is the only "fast food" outlet on the reservation or within 2 miles of the government center. It serves approximately eighty meals per day to members of the Nation and reservation workers and casino workers and patrons. In addition, it is the only motor fuel station owned by the Nation serving its 121 square mile reservation.

The Nation Station faces numerous competitors past which casino customers travel and who advertise their prices in signage visible from US 75 Highway. These stations include: the Indian Country General Store at 19075 US 75 Highway (on US 75 near 190th Road) and the Indian Country Mini Mart at 20330 US 75 Highway (1½ miles north of the Indian Country General Store), both of which are in Jackson County, and the Kickapoo station and the Sac and Fox station, both of which are on US 75 just north of Jackson County in Brown County. In addition to these stations, customers traveling from Topeka also pass numerous stations before entering US 75 and several are located on US 75 between the Kansas River and Mayetta.

With regard to diesel fuel, the Nation Station is not signed up with any of the major fuel card operations, such as Comdata, T-Chek, etc., and it does not have a Trendar or other system to take their cards as payment for diesel fuel.

Very truly yours,

/s/ Jim Moulden
Jim Moulden
Nation Station Manager

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, Defendant.
No. 99-4071-JAR.
Jan. 15, 2003.

Indian tribe brought action for declaratory and injunctive relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. State moved for summary judgment. The District Court, Robinson, J., held that: (1) Court had jurisdiction to hear tribe's claim; (2) tribe had standing to bring action; (3) Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; (4) state was not barred by federal preemption from imposing tax; (5) tribe's interest in raising revenues did not outweigh state's interests; and (6) Kansas Act for Admission did not bar imposition of tax.

Motion granted.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Robinson, District Judge.

This action is before the Court on defendant's Motion for Summary Judgment (Doc. 49). Plaintiff has filed a Response (Doc. 59) and defendant has filed a Reply (Doc. 68). The Court has reviewed the parties' filings and is now prepared to rule.

I. FACTS

The following facts are taken from the record and are either stipulated, uncontroverted or viewed in the light most favorable to plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents. The Court also disregards conclusory statements.

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Once the fuel arrives on the reservation, the Nation Station unloads, stores, monitors and dispenses the fuel. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales.

The Tribe imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. The Nation Station is subject to $300,000 in tribal fuel taxes per year. The Tribe spends revenue from the fuel tax to construct and maintain roads, including the road leading from U.S. Highway

[1] 25 U.S.C. § 2701 *et seq.*

75 to the Tribe's casino and other roads on and near the reservation. The Tribe also provides government services including law enforcement, fire protection, emergency services, education services, urban planning, court services and other miscellaneous services. Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands. Then, in 1995, the Kansas legislature amended the Kansas Motor Fuel Tax Act[2] and the Department of Revenue began to impose fuel tax on fuel distributed to Indian tribes on tribal land. The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[4] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law."[5] A "genuine"

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

[4] Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993).

[5] *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

factual dispute requires more than a mere scintilla of evidence.[6]

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact.[7] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof."[8] The nonmoving party may not rest on its pleadings but must set forth specific facts.[9]

"[The court] must view the record in a light most favorable to the parties opposing the motion for summary judgment."[10] Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative.[11] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[12]

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[6] *Id.* at 252, 106 S.Ct. 2505.

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir.1991).

[8] *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991).

[9] *Applied Genetics*, 912 F.2d at 1241.

[10] *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

[11] *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

[12] *Id.* at 251-52, 106 S.Ct. 2505.

III. DISCUSSION

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claims that the Indian Commerce Clause,[13] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[14] or other federal law prohibits imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. Defendant asserts that summary judgment should be granted because the State is entitled to Eleventh Amendment immunity,[15] the Tribe lacks standing, and the Hayden-Cartwright Act provides congressional consent for imposition of the State's fuel tax.[16] Defendant also asserts that there is no material issue of fact concerning whether the state fuel tax is preempted by federal law, whether the state fuel tax improperly infringes upon the Tribe's sovereign right to self-government, or whether the Kansas Act for Admissions bars imposition of the tax. The Court will take each of defendant's contentions in turn.

A. Jurisdiction and the Eleventh Amendment

The Tribe asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1362,[17] which grants

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[13] U.S. CONST. art. I, § 8 cl. 3.

[14] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[15] U.S. CONST. amend. XI.

[16] 4 U.S.C. § 104.

[17] The Tribe also claims jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331.

district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Defendant argues that despite the grant of jurisdiction in § 1362, the Eleventh Amendment bars the Tribe's claims. Defendant also asserts that *Ex parte Young*,[18] a legal fiction created to overcome the Eleventh Amendment's bar under certain circumstances, is inapplicable in this case. As discussed below, defendant's arguments are unfounded.

The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe.[19] In *Ex parte Young,* the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers, sued in their official capacity, to enjoin an alleged ongoing violation of federal law.[20] Defendant contends that the *Ex Parte Young* exception is inapplicable in this case because the relief being sought by the Tribe implicates special sovereignty interests.

[18] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[19] *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

[20] *Ex parte Young,* 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young*).

Defendant points to the Supreme Court case *Idaho v. Coeur d'Alene Tribe of Idaho*,[21] wherein the Court ruled that the *Ex parte Young* exception could not be entertained when the relief requested would be as much of an intrusion on state sovereignty as an award of money damages. In *Coeur d'Alene,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment to submerged lands located within the boundaries of the Coeur d'Alene Reservation.[22] The tribe also sought injunctive relief against various state officials to prevent them from exercising regulatory jurisdiction over the submerged land. The Court determined that the tribe's claims were the functional equivalent to a quiet title action and if relief was granted, it would have divested the state of substantially all regulatory power over the land at issue.[23] Thus, the Court found that the requested relief would affect Idaho's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," defeating plaintiff's *Ex parte Young* action.[24]

Soon after the Supreme Court's *Coeur d'Alene* decision, the Tenth Circuit decided *ANR Pipeline Co. v. Lafaver*,[25] where it held that the states' power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests, defeating an *Ex parte Young* action. In so holding, the Tenth Circuit interpreted *Coeur d'Alene* as requiring a new two-step analysis for determining whether *Ex parte Young* applies

[21] 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

[22] *Id.* at 264-65, 117 S.Ct. 2028.

[23] *Id.* at 265, 117 S.Ct. 2028.

[24] *Id.* at 287, 117 S.Ct. 2028.

[25] 150 F.3d 1178, 1193 (10th Cir.1998).

in any given case. According to *ANR Pipeline,* federal courts are to first "examine whether the relief being sought against a state official implicates special sovereignty interests."[26] If the answer to the first inquiry is affirmative, the court "must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment."[27]

Relying on *Coeur d'Alene* and the *ANR Pipeline,* defendant asserts that an *Ex parte Young* action does not apply in this case because the relief sought by the Tribe implicates special sovereignty interests in the State's system of taxation and the requested relief would be the functional equivalent to money damages against the State. The Court finds defendant's reliance on these cases is misplaced. To rule otherwise would be to ignore the long line of cases decided in federal court relating to state taxation on tribal affairs.[28] As the Ninth Circuit pointed out in *Agua Caliente Band of Cahuilla Indians v. Hardin,*[29] "in the context of state taxation of *tribes,* there are preemption considerations and *competing* sovereignty interest, the merits of which are governed by a long line of cases." The issues presented by state taxation of tribal

[26] *Id.* at 1190 (citations and quotations omitted).

[27] *Id.*

[28] *See e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Moe v. Confederated Salish and Kootenai,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[29] 223 F.3d 1041, 1048 (2000).

interests were not present in either *ANR Pipeline* or *Coeur d'Alene,* both of which have been limited to their particular facts.[30] Thus, the Court finds that an *Ex parte Young* action is appropriate under the circumstances of this case.

In the alternative, the Tenth Circuit has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. § 1362, may seek injunctive relief from state taxation in federal court.[31] In *Sac and Fox,* the Tenth Circuit contemplated, under a set of facts very similar to those at hand, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Kootenai Tribes,*[32] the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, barred the tribes' suit.[33] The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida v.*

[30] *Robinson v. Kansas,* 117 F.Supp.2d 1124, 1136-37 (D.Kan.2000) (noting that Tenth Circuit has made it clear that finding a special sovereignty interest such as those found in *ANR Pipeline* and *Coeur d'Alene* is the exception not the rule) (citing *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir.1998); *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th Cir.1998); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998); *Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir.1998); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999).

[31] *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 571-73 (10th Cir.2000). *See also Sac and Fox Nation of Missouri,* 979 F.Supp. 1350, 1352-53 (D.Kan.1997).

[32] 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding an Indian tribe's right to seek injunctive relief from state taxation in federal court).

[33] *Sac and Fox,* 213 F.3d at 572.

Florida,[34] finding that the *Seminole Tribe* Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from state taxation.[35] Based on the *Moe* decision, the Tenth Circuit reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of the Kansas fuel tax case.[36] Like the Tenth Circuit, this Court asserts jurisdiction under § 1362 and finds the Eleventh Amendment does not bar this suit.

As instructed by the Tenth Circuit in *Sac and Fox,* this Court has jurisdiction and the Eleventh Amendment does not bar the Tribe's claim brought pursuant to § 1362. Further, based on the legal fiction created in *Ex parte Young,* the Court finds that it has jurisdiction to hear this dispute. Therefore, summary judgment is not appropriate based on the State's Eleventh Amendment immunity.

B. Standing

Under Article III, § 2 United States Constitution, Federal courts have jurisdiction to hear a matter only if an actual "case or controversy" exists.[37] In determining

[34] 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Article I of the United States Constitution, including the Indian Commerce Clause, does not provide sufficient authority for Congress to abrogate that State's Eleventh Amendment immunity).

[35] *Sac and Fox,* 213 F.3d at 571 (citing *Blatchford,* 501 U.S. at 784, 111 S.Ct. 2578).

[36] *Sac and Fox,* 213 F.3d at 572.

[37] U.S. CONST. art. III, § 2.

whether a case or controversy exists, the Court must evaluate whether the Tribe has standing to sue.[38]

As stated by the Tenth Circuit in *Sac and Fox,* the Constitutional standing question addresses "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant its invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on its behalf."[39] To meet the standing requirement, the Tribe must allege "1) a concrete and particularized actual or imminent injury, 2) which is fairly traceable to the defendant's conduct, and 3) which a favorable court decision will redress."[40] In addition to the above mentioned requirements, the Supreme Court has enunciated several other prudential standing requirements. First, a plaintiff must assert its own rights and not those of others.[41] Next, a plaintiff will not meet the standing requirement if he or she asserts a "generalized grievance shared by a large class of citizens."[42] Finally, the interest which a plaintiff wants protected must be within the "zone of interests to be protected by the statute or Constitutional guarantee."[43]

[38] *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[39] *Sac and Fox,* 213 F.3d at 573 (citations and quotations omitted).

[40] *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville,* 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)).

[41] *Id.* at 573 (citing *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

[42] *Id.* (quoting *Warth,* 422 U.S. at 499, 95 S.Ct. 2197).

[43] *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)).

Defendant argues that the Tribe lacks standing to bring this case because the tax in question falls on the distributors, not the Tribe.[44] The Court finds that the Tenth Circuit's decision in *Sac and Fox* settles this issue.

Addressing the exact arguments made by defendant here, the *Sac and Fox* court held that a tribe has standing to sue a state in federal court where the tribe alleges particularized imminent economic injury due to the state's imposition of the fuel tax.[45] In *Sac and Fox,* the state alleged that the tribes did not have standing to bring suit challenging the Kansas motor fuel tax because the legal incidence of the tax falls on the distributors of the fuel rather than on the tribal retailers. The court rejected this argument stating that the court had "little difficulty concluding that the Tribes [have] constitutional standing to maintain their suit against the State."[46]

Like the tribes in *Sac and Fox,* the Tribe here meets the standing criteria to challenge the State's fuel tax.[47] First, the Tribe provides affidavits claiming injury including

[44] *See Sac and Fox,* 213 F.3d at 580 (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

[45] *Id.* at 573-74. The Court acknowledges that the case cited by defendant, *Carter v. Montana Dept. of Transp.,* 274 Mont. 39, 905 P.2d 1102 (1995), where the court held a fuel retailer did not have standing to challenge the state fuel tax when the legal incidence of the tax falls on the distributor, is somewhat in contrast to the Tenth Circuit's decision in *Sac and Fox.* Despite the value of the case to defendant's position, the Court finds it is bound by Tenth Circuit precedent, not by Montana Supreme Court precedent. Further, the *Carter* case can be distinguished because the gas station in question was not tribally owned and the case was not brought by the tribe, it was brought by an individual Indian.

[46] *Sac and Fox,* 213 F.3d at 573.

[47] *See id.* at 573-74.

interference with the right of self government and economic injury caused by the state fuel tax. Next, the alleged injury is directly traceable to the State's desire to impose a fuel tax,[48] in that the Act allows the tax to be passed on directly to the retailers.[49] Finally, deciding in favor of the Tribe will redress the alleged injury because if the distributors who distribute fuel to the Nation Station are not required to pay the tax, there will be no threat of passing the tax through to the Tribe.[50]

Further, like in *Sac and Fox,* the prudential standing principles discussed above do not bar the Court's exercise of jurisdiction.[51] First, the Tribe asserts its own rights to be free from the cost of motor fuel tax. The fact that the consumers and fuel distributors will unquestionably benefit if the Tribe is successful in challenging the tax, does not alter the Court's analysis.[52] Next, because the Tribe has asserted its right to be free from the fuel tax, it is not asserting a "generalized grievance" prohibiting the Court from exercising jurisdiction.[53] Finally, the Tribe's alleged economic interest in being free from taxation is arguably within the "zone of interest" that federal law seeks to protect.[54] In grappling with the "zone of interest" prudential requirement for standing, the Tenth Circuit noted that federal law has long sought to "protect tribal

[48] *Id.* at 574.

[49] *See* Kan. Stat. Ann. § 79-3409.

[50] *Sac and Fox,* 213 F.3d at 574 (citing Kan. Stat. Ann. § 79-3409).

[51] *See id.*

[52] *See id.*

[53] *Id.*

[54] *Id.*

self-government from state interference, including state taxation."[55]

Based on the above analysis, the Court finds that the Tribe has demonstrated that it has standing to bring this action in federal court. Therefore, summary judgment will not be granted on defendant's challenge to the Tribe's standing.

C. Hayden-Cartwright Act, 4 U.S.C. § 104

Defendant argues that pursuant to the Hayden-Cartwright Act, 4 U.S.C. § 104, Congress consented to the states' power to tax fuel distributions to Indian tribes, leaving the Tribe without recourse to challenge the tax. In pertinent part § 104(a) of the Act states:

> All tax levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military *or other reservations*, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State

[55] *Id.* (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

> . . . within whose borders the reservation may be located.[56]

The State argues that the phrase "other reservations" includes Indian lands and that the term "licensed trader" specifically refers to tribal retailers. The Tribe counters that the Act is ambiguous and that ambiguity should be construed in favor of Indian sovereignty. Unfortunately, the Court is left with little guidance from the Circuit Courts or the Supreme Court in determining whether Congress intended the phrase "other reservations" to include Indian reservations.[57] Only the Idaho Supreme Court and the United States District Court for the District of Idaho have struggled with this difficult issue.[58] Although the Court is not bound by either of these decisions, the Court finds the decisions persuasive and holds that the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.

The Court begins its analysis by noting that a state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.[59] Because of the "unique trust relationship" between

[56] (Emphasis added).

[57] *Sac and Fox*, 213 at 576 ("Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands.")

[58] *Coeur D'Alene Tribe v. Hammond*, 224 F.Supp.2d 1264 (D.Idaho 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 136 Idaho 53, 28 P.3d 996 (2001), *cert denied*, 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002).

[59] *See County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(Continued on following page)

the United States and Indian Nations, statutes that affect Indians are to be "construed broadly, with any ambiguous provision to be interpreted to their benefit."[60] Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians.[61]

Defendant argues that the language in the Hayden-Cartwright Act expressly approves state taxation of fuel delivered in Indian country. The Tribe argues that Congress did not expressly approve state taxation of motor fuel on Indian reservations and that the statute is, at best, ambiguous. Thus, the Tribe argues that the statute must be construed in favor of the Tribe and interpreted so as to not grant such taxing authority. Following the principles elucidated above, the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country. Defendant argues that the language in the Act, which allows for state taxation of motor fuels sold on

("['A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservations Indians.") (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory.")

[60] *Hammond*, 224 F.Supp.2d at 1268 (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *McClanahan*, 411 U.S. at 174, 93 S.Ct. 1257).

[61] *Hammond*, 224 F.Supp.2d at 1268.

"United States military or other reservations,"[62] includes Indian reservations. The Court is not persuaded by defendant's argument. As noted by United States District Court for the District of Idaho in *Hammond*, the term "reservation" has broad meaning and may or may not include Indian reservations.[63] The *Hammond* court explained that the term reservation has been used in land law to describe any body of land which Congress has reserved from sale.[64] The term has also been used to describe "military bases, national parks and monuments, wildlife refuges, and federal property."[65]

Additionally, as articulated by the Idaho Supreme Court in *Goodman Oil*, if Congress intended to include Indian lands in the pertinent part of the statute, § 104(a), it would have done so. The Act uses the phrase "Indian Lands or other federal reservations" in section three and the phrase "Indian reservation roads" in section six.[66] Congress's use of these distinct phrases convinces this Court that Congress could have specified that the entire Act was to apply to Indian reservations or Indian lands but did not. Therefore, by not using the word "Indian Reservation" in the applicable part of the Act, § 104(a), the language of the Act does not clearly show that Congress intended to allow state taxation of tribal fuel.[67]

[62] 4 U.S.C. § 104(a).

[63] *Hammond*, 224 F.Supp.2d at 1269.

[64] *Id.* (quoting *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

[65] *Id.*

[66] *See Goodman Oil*, 28 P.3d at 1000.

[67] *Id.*

Defendant also argues that the use of the term "licensed traders" equates to Indians or Indian traders, lending support for the position that Congress intended to allow states to tax in Indian country. The Court disagrees with defendant and finds that use of the term "licensed traders" is also ambiguous and therefore does not support defendant's position that the Act expressly grants states the authority to tax fuel on Indian reservations. As noted by the *Goodman Oil* court, at the time the Hayden-Cartwright Act was passed, the term licensed traders could have meant licensed sellers of malt beverages, licensed retailers on government reservations or licensed traders selling goods on all government reservations.[68] So, once again the term used by Congress is too broad to have the effect of conveying upon states the right to tax Indians. Congress could have used the term licensed Indian traders had it meant to grant states the authority to tax fuel on Indian reservations.

Defendant also urges the Court to resolve any ambiguities in the language of the Act by turning to the Act's legislative history and the executive interpretation of the Act. Defendant insists that the Court is required to defer to agency interpretation of a statute as required by the Supreme Court's decision in *Chevron U.S.A., Inc v. Natural Resources Defense Council.*[69] Defendant argues that the stated purpose of the statute, and two agencies' interpretations show, that the Act applies to Indian reservations.

[68] *Id.* (citing *Falls City Brewing Co. v. Reeves*, 40 F.Supp. 35 (D.Ky.1941)).

[69] 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Again, the Court disagrees. The Court will address defendant's arguments regarding the legislative history and agency interpretation in turn.

First, defendant draws the Court's attention to legislative history explaining the intended purpose of the Act. The purpose of the Act, which was passed in 1936, was to fund the extension of highway construction and maintenance. Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations. The legislative history discussing the purpose of the Act never specifically refers to Indian reservations.[70] Instead, the legislative history only discussed the inequities of selling gasoline free of state tax in "post exchange stores" and "government reservations." Once again, defendant contends that the use of the term government reservations was meant to include Indian reservations. As discussed above, the Court is not convinced that the use of the term "government reservations" includes Indian reservations. Further, as noted by the *Hammond* court, simply because Congress expressed its intent to give up the federal government's exemption from state motor fuel taxes, does not mean Congress was willing to sacrifice the Indians' exemption from the tax as well.[71]

Next, defendant calls the Court's attention to the opinions of the Attorney General and Solicitor of the

[70] *See* 80 CONG. REC. 8, 8701 (remarks of Congressman Whittington) ("In post exchange stores and on government reservations, gasoline and motor fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States. . . .").

[71] *Hammond*, 224 F.Supp.2d at 1269.

Department of Interior, alleging that the opinions clarify any ambiguity contained in the language of the statute Four months after the Act was passed in 1936, the Attorney General stated that the Act applied to a "military reservation, or an Indian reservation. . . ."[72] Also, the Solicitor of the Department of the Interior concluded that the Act authorizes state taxation of sales of motor fuel purchased on a reservation for tribal enterprise for resale both to non-Indians and members of the tribe.[73]

These statements suggest that the Attorney General and the Solicitor of the Department of Interior believed that the Act applied to Indian reservations, but as discussed in *Goodman Oil,* these statements are not sufficient to clarify the ambiguities contained in the Act.[74] The Attorney General Opinion of 1936 dealt with whether national parks fell within the Act and mentions "Indian Reservations" in passing.[75] The entire passage reads "some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations and that section does not expressly mention national parks."[76] The qualifier of "apparently" lends weight to this Court's conclusion that the Attorney General's interpretation is ambiguous.

The opinion of the Solicitor of the Department of the Interior is equally ambiguous. Referencing the Act, the

[72] 38 U.S. Op. Atty Gen. 522, 524 (1936).

[73] Application of Federal and State Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 138-40 (1940).

[74] *Goodman Oil,* 28 P.3d at 1000-01.

[75] *See id.*

[76] 38 U.S. Op. Atty Gen. 522, 524 (1936).

Solicitor said "[i]t is not clear, however, whether the Government agencies specified are intended to include such federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations."[77] While the Solicitor eventually concluded that the taxes could be levied in the circumstances before him, his statement shows that he also found the Act ambiguous.

Further, as noted in *Goodman Oil* and *Hammond,* Congress has recently attempted to pass legislation to authorize the state taxation of fuel sales on Indian reservations.[78] Such an attempt was apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations. If Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.

Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. The Court is further not persuaded by defendant's arguments relating to the legislative history or subsequent agency interpretation of the Act. Because Congress must be explicit if it intends to grant states the power to tax within Indian country, and because the Court finds Hayden-Cartwright does not provide for an explicit

[77] 57 Interior Dec. 129 at 138 (1940).

[78] *Hammond,* 224 F.Supp.2d at 1269 (citing H.R. No. 3966, 105th Cong.2d Sess. (1998); S. 550 106th Cong. (1999)); *Goodman,* 28 P.3d at 1001.

grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations, defendant's request for summary judgment on this issue is denied.

Because the Hayden-Cartwright Act is not a basis for summary judgment and because there is no jurisdictional bar preventing the Court from moving forward, the Court must now turn to the merits of the case.

D. Preemption and Tribal Self-Government

Two separate but distinct doctrines pose a barrier to the assertion of state taxation over transactions occurring on reservation land: federal preemption and tribal rights to self-government.[79] These doctrines manifest themselves from the broad authority given to Congress to regulate tribal affairs under the Indian Commerce Clause and from "the semi-independent" position of Indian tribes.[80] The Tribe asserts these doctrines bar the State from imposing its motor fuel tax on fuel delivered to the reservation. The Court is required to analyze the barriers posed by these doctrines independently because either doctrine, standing alone, can be a sufficient basis for holding that Kansas's motor fuel tax is invalid as it relates to fuel delivered to the Tribe's reservation.[81]

[79] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[80] *Id.*

[81] *Id.*

1. Preemption

It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country.[82] If, however, the legal incidence of the tax rests on non-Indians, as it undisputably does here, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy."[83] Because the legal incidence of the Kansas motor fuel tax falls on non-Indians, the Court is required to determine if a material issue of fact exists as to whether the balance of the federal, state and tribal interests tilt in favor of the Tribe. The Court must grant defendant's motion for summary judgment if the Court finds the evidence favoring the State's interest in imposing the motor fuel tax is so one-sided that defendant is entitled to prevail as a matter of law.[84]

Ordinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in

[82] *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians.' ").

[83] *Chickasaw Nation,* 515 U.S. at 459, 115 S.Ct. 2214.

[84] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

favor of the state.[85] In *Washington v. Confederated Tribes of the Colville Indian Reservation,* the Supreme Court held that while federal policy seeks to foster tribal self-government and economic development, it does not preclude state taxation of sales by Indians to nonmembers of the tribe.[86] In so holding, the Court announced that tribes cannot assert an exemption from state taxation by "imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises."[87] The Court reasoned that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts. . . ."[88]

The Tribe asserts that the rules set forth in *Colville* are inapplicable in this case because unlike the customers who were drawn to the smokeshops to avoid state cigarette tax in *Colville,* gas purchasers are drawn to the Nation Station because of its close proximity to the casino, a tribally owned and operated endeavor. The Ninth Circuit was presented with a similar argument in *Salt River Pima-Maricopa Indian Community v. Arizona.*[89] In that case, the tribe argued that the rules set forth in *Colville* only apply in cases where a tribe attempts to create a "magnet" effect of drawing customers on to the reservation by offering a lower sales tax rate than the state. The court cast serious doubt on the tribe's attempt to read *Colville* so

[85] *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 737 (9th Cir.1995).

[86] 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

[87] *Id.*

[88] *Id.*

[89] 50 F.3d 734.

narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent. According to the *Salt River* court, the most important factors in determining that the state tax was not preempted by federal law was that the goods and services sold were non-Indian, the legal incidence of the tax falls on non-Indians and the state provided most of the governmental services to those who bear the ultimate economic burden of the state tax.[90] Likewise, in the case before the court, the legal incidence of the tax falls on non-Indians, the Tribe is importing a non-Indian product[91] and selling the product mostly to non-Indians and those who bear the ultimate economic burden of the fuel tax, the consumers, are provided governmental services by the state.[92]

While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are

[90] *Id.* at 737.

[91] The court rejects the implication that fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include the proper facilities for unloading, storage, and dispensing of gasoline. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 800 F.2d 1446 (9th Cir.1986) (rejecting the tribe's assertion that *Colville* is inapposite where the tribe markets cigarettes as part of a legitimate business enterprise, where residents and visitors take advantage of other amenities offered by the tribe).

[92] *See Sac and Fox,* 213 F.3d at 584 (stating that the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer"). As discussed below in section D.2., the court rejects the Tribe's argument that it bears the ultimate economic burden of the fuel tax.

imported from off-reservation for sale to non-Indians.[93] The State's interest in raising revenues is strongest when, as here, non-Indians are taxed, and those taxes are used to provide the taxpayer with government services.[94] Based on the foregoing analysis, it is clear that the preemption balance unmistakably tips in favor of the State. Thus, summary judgment shall be granted as to the Tribe's claim arising under federal preemption.

2. Tribal Self-Government

The Tribe also asserts that imposition of the state fuel tax infringes on the Tribe's sovereign right to impose tribal fuel taxes, infringes upon the Tribe's sovereign right to finance and provide essential government services, infringes upon the Tribe's sovereign right to self-government and self-determination, and infringes upon the Tribe's right to conduct business and to economically develop its reservation. "The doctrine of tribal self-government, while constituting an independent barrier to the assertion of state taxing authority over activities taking place on tribal reservations, bears some resemblance to that of federal

[93] *Salt River,* 50 F.3d at 739.

[94] The Tribe has asserted that eleven percent of its fuel sales are derived from sales to reservation residents, tribal government employees and other persons who work on the reservation. The Tribe has not asserted that a majority or even a substantial portion of its fuel sales are made to reservation residents, those who primarily reap the benefits of tribal government services. It cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel. In addition, the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway that leads to the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation.

preemption."[95] Application of this doctrine requires the Court to weigh both state and tribal interests in raising revenue to provide taxpayers with essential government services.

The Tribe's interest in raising revenues to support essential tribal services is strongest when "the revenues are derived from *value generated on the reservation* by activities involving the Tribes *and* when the *taxpayer is the recipient of tribal services.*"[96] Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.[97]

The Tribe asserts that the revenues derived from the fuel sold at the Nation Station are a result of value generated on Indian lands because the casino, operated in close proximity to the gas station, generates a flow of motor vehicle traffic. The Tribe contends that the gasoline market exists because of the nearby casino, not simply because patrons can purchase gas free from state motor fuel tax. Assuming the Tribe can show that they are marketing a product, the value of which is derived on reservation land, the Tribe cannot show that those who

[95] *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404, 1412 (9th Cir.1992) (citing *White Mountain Apache Tribe,* 448 U.S. at 142, 100 S.Ct. 2578).

[96] *Colville,* 447 U.S. at 156-57, 100 S.Ct. 2069 (emphasis added).

[97] *Salt River,* 50 F.3d at 738.

ultimately take on the economic burden of the tax, the consumers, are the recipients of tribal services as opposed to state services.[98]

The Tribe proposes that the ultimate economic burden of the tax does not fall on the consumers but rather it falls on the Tribe. The Tribe bases this assertion on the presumption that the tax will destroy the Nation Station's business by burdening the Nation Station with double taxation and interfering with the Tribe's right to impose tribal taxes and to finance its government. The Court cannot agree for several reasons.

First, in *Sac and Fox,* the Tenth Circuit held that even though the legal incidence of the Kansas motor fuel tax falls on the fuel distributors, the ultimate, albeit indirect, economic burden of the Kansas motor fuel tax falls on the consumer.[99] Thus, according to the Tenth Circuit, if the Tribe can show that the ultimate economic burden falls on tribal members as the consumers of the fuel, the tax improperly interferes with internal tribal affairs.[100] Such a showing would require the Tribe to produce evidence that a substantial portion of the Tribe's retail fuel sales are to tribal members. The Tribe cannot make the required

[98] *See Sac and Fox,* 213 F.3d at 584 (stating the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer").

[99] *Sac and Fox,* 213 F.3d at 584. *See also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 607-10, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (holding that the legal incidence of the tax does not always fall upon the entity legally liable for payment of the tax); *Chickasaw Nation v. Oklahoma Tax Comm'n,* 31 F.3d 964, 972 (10th Cir.1994) (noting that the "question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.").

[100] *Id.*

showing as their own evidence indicates that only a small percentage of the retail fuel sales are made to tribe members. The Tribe presents evidence indicating that seventy-three percent of the fuel sold at the Nation Station is sold to casino patrons and only eleven percent of the fuel sales are made to persons who live or work on the reservation. Although the Tribe certainly provides substantial services to those persons who live and work on the reservation, that group of persons constitutes only a small portion of the consumers who purchase fuel at the Nation Station. The majority of the fuel consumers are not members of the Tribe and are thus recipients of state services.[101]

Second, the Tribe's contention that the state fuel tax and the tribe's fuel tax cannot coexist because the result will be double taxation and an increase in the product's cost must also be rejected. There is no question that the Tribe's power to tax transactions occurring on trust lands "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . ."[102] But, a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business.[103]

[101] The Court recognizes that the Tribe provides some governmental services to non-Indian purchasers by constructing and maintaining reservation roads and providing police protection. But, it cannot be disputed that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation.

[102] *Colville,* 447 U.S. at 152, 100 S.Ct. 2069.

[103] *Id.* at 154-158, 100 S.Ct. 2069. *See also Gila River Indian Cmty.,* 91 F.3d 1232, 1239 (9th Cir.1996) ("The State and Tribe have concurrent taxing jurisdiction . . . [a]ccordingly, the Tribe's tax program is not undermined by the state tax.").

Further, any negative economic impact on the Tribe by the imposition of the state fuel tax is not necessarily sufficient to invalidate the tax.[104] Indeed, the state may sometimes impose a "non-discriminatory tax on non-Indian consumers of Indian retailers doing business on the reservation . . . even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[105]

Finally, the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government. The Supreme Court has held that merely because the result of imposing the fuel tax will deprive the Tribes of the revenues which they are currently receiving, does not infringe on the right of reservation Indians to "make their own law and be ruled by them."

The Tribe's interests in raising revenues simply cannot outweigh the State's legitimate interest in raising revenues through its system of taxation.[106] The State's interest in imposing such a tax is greatest when the "tax is directed at off-reservation value and when the taxpayer is the recipient of state services".[107] In this case, it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors.[108] Further, it is also

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[104] *Colville*, 447 U.S. at 152, 100 S.Ct. 2069; *Sac and Fox*, 213 F.3d at 583.

[105] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[106] *Id.* at 157, 100 S.Ct. 2069. *See also ANR Pipeline*, 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

[107] *Colville*, 447 U.S. at 157, 100 S.Ct. 2069.

[108] *Sac and Fox*, 213 F.3d at 580.

undisputed that only a small part of the fuel sales are made to persons who either live or work on the reservation who are the recipient of tribal services. The majority of the fuel consumers are recipients of state services. Even if the Court accepts the Tribe's proposition that the fuel sales are a result of value generated on reservation land, the Tribe cannot show that a substantial portion of the taxpayers are recipients of tribal services as opposed to state services. For the above reasons, defendant's motion for summary judgment shall be granted on the Tribe's claim regarding tribal rights to self-government.

E. Kansas Act for Admission

In addition to claims based on preemption and tribal rights to self-government, the Tribe also asserts a claim under the Kansas Act for Admission § 1. The Kansas Act for Admission states that:

> [n]othing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory. . . .

Based on this language, the Tribe argues that the state is prohibited from taking action that impairs the Tribe's right to impose and collect its own tribal taxes, impairs the Tribes right to finance its government through tribal taxation and imposes on the Tribe's right to engage

in sovereign functions of self-government. The Tribe asserts that unlike causes of action based on federal preemption, there is no need to balance the state, federal and tribal interests for claims arising from the Kansas Act for Admission.

The Court finds that even if the Kansas Act for Admission can be read to preserve the Tribe's sovereign right to impose tribal taxes on reservation and to engage in commercial business on its reservation as proposed by the Tribe, the Court's foregoing analysis regarding tribal rights to self-government is still applicable. As mentioned above, while the Tribe has every right to impose tribal fuel taxes, by doing so it does not oust the State from imposing state tax on sales made to non-Indians. Further, even if the state tax imposes on the Tribe's ability to carry-on a commercial business by increasing the cost of the product, a state tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[109] "[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."[110] For these reasons defendant is entitled to judgment as a matter of law and summary judgment is granted on the Tribe's claim asserted under the Kansas Act for Admission.

IV. CONCLUSION

In finding that the Court has jurisdiction over this matter, the Court rejects defendant's claim to immunity based on the Eleventh Amendment and rejects defendant's

[109] *Colville*, 447 U.S. at 151, 100 S.Ct. 2069.

[110] *Id.*

claim that the Tribe lacks standing to bring this suit. Additionally, the Court finds, contrary to defendant's arguments, that the Hayden-Cartwright Act does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations. Finally, because no material issue of fact remains regarding the Tribe's claims arising under federal preemption, tribal right to self-government or Kansas Act for Admission and because defendant is entitled to judgment as a matter of law, defendant's motion for summary judgment is granted.

IT IS THEREFORE BY THE COURT ORDERED that State's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS SO ORDERED.

United States District Court,
D. Kansas.
PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen S. RICHARDS, Secretary of the
Kansas Department of Revenue, State of Kansas,
in his official capacity, Defendant.
No. 99-4071-JAR.
July 2, 2003.

Indian tribe moved for reconsideration of decision, 241 F.Supp.2d 1295, which denied its action for relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. The District Court, Robinson, J., held that (1) district court did not rely on allegedly objectionable evidence in making its ruling, and (2) request that court rule that tribe had a constitutional and self-government right to impose tribal taxes with respect to motor fuel sold on reservation, did not warrant reconsideration.

Motion denied.

ROBINSON, J.

This matter is before the Court on Plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) brought pursuant to Fed.R.Civ.P. 59(e). Plaintiff asks this Court to reconsider and alter its order granting defendant's motion for summary judgment (Doc. 73).

I. BACKGROUND

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose

reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,[1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Fuel sales made to casino patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales via a tribally imposed tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel.

In addition to the tribal fuel tax, the Kansas Department of Revenue collects motor fuel tax on fuel distributed to the Nation Station pursuant to the Kansas Motor Fuel Tax Act.[2] The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.[3]

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe

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[1] 25 U.S.C. § 2701 *et seq.*

[2] *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

[3] Kan. Stat. Ann. § 79-3409.

claimed that the Indian Commerce Clause,[4] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas[5] or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by this Court on January 15, 2003.[6]

In granting defendant's motion for summary judgment, the Court found that neither the doctrine of federal preemption or the doctrine of tribal rights to self-government prevented the state from imposing taxation on the fuel sold at the Nation Station. The Court further found that the Kansas Act for Admission did not prevent the state from imposing its own tax on fuel sold at the Nation Station. Plaintiff now asks the Court to reconsider its judgment. For the reasons discussed below, plaintiff's request is denied.

II. STANDARD OF REVIEW

A court may reconsider and alter a prior judgment if it is necessary to correct manifest errors of law or fact or to accept newly discovered evidence.[7] However, this does not include a review of arguments or evidence that could and should have been presented through the summary judgment

[4] U.S. CONST. art. I, § 8 cl. 3.

[5] *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

[6] *See Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[7] *Buell v. Security General Life Ins. Co.*, 784 F.Supp. 1533, 1536 (D.Colo.1992), *aff'd* 987 F.2d 1467 (10th Cir.1993).

process.[8] Likewise, it is inappropriate to re-visit issues that have already been addressed.[9] There is no entitlement to a second chance when a party has failed to present its strongest case in the first instance.[10] Three grounds for reconsideration are generally recognized: (1) an intervening change in controlling law, (2) availability of newly discovered evidence, and (3) a need to correct clear error or prevent manifest injustice.[11] Deciding whether to grant or deny a motion to alter or amend a judgment is within the court's discretion.[12]

III. DISCUSSION

Plaintiff's motion to reconsider first asserts that the Court erred in granting defendant's motion for summary judgment because the Court relied on defense exhibits that plaintiff had objected to in "Plaintiff's Objections to Defendant's Witness and Exhibit List" (Doc. 54). While plaintiff's objections to defendant's witness and exhibit list sought to preclude defendant from using objectionable evidence at trial, plaintiff's response to defendant's motion for summary judgment incorporated some of the objections as they related to those exhibits supporting defendant's

[8] *Steele v. Young*, 11 F.3d 1518, 1520 n. 1 (10th Cir.1993); *Wolfgang v. Mid-American Motorsports, Inc.*, 914 F.Supp. 434, 438 (D.Kan.1996); *Buell*, 784 F.Supp. at 1536.

[9] *Comeau v. Rapp*, 810 F.Supp. 1172, 1175 (D.Kan.1992).

[10] *Anspach v. Tomkins Indus., Inc.*, 817 F.Supp. 1499, 1518 (D.Kan.1993), *aff'd* 51 F.3d 285 (10th Cir.1995) (Table).

[11] *See e.g., Eichenwald v. Krigel's, Inc.*, 908 F.Supp. 1531, 1564-65 (D.Kan.1995).

[12] *Bancamerica Comm. Corp. v. Trinity Indus., Inc.*, No. 90-2325-GTV, 1995 WL 646790, at *1 (D.Kan. Oct.19, 1995) (citing *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir.1988)).

motion for summary judgment. On page seven of its response to defendant's motion for summary judgment, plaintiff asserts, "The Nation objects to Defendant's Exhibits 2-6 for all of the reasons stated in Plaintiff's Objections to Defendant's Witness and Exhibit List filed herein on October 30, 2000."

The exhibits that plaintiff objected to contain information regarding the services provided to the reservation such as education, fire and police support. Plaintiff now seeks a Court order sustaining its objections to defendant's witness and exhibit list and in turn, plaintiff asks the Court to reconsider its ruling on defendant's motion for summary judgment. The Court declines plaintiff's proposition to rule on its objections to defendant's witness and exhibit list because contrary to plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion.

Plaintiff contends that the Court relied on objectionable evidence because in Footnote 94 of the Court's order, the Court noted that, "the State also provides services on and near the reservation including maintenance of U.S. Highway 75 . . . fire and police protection." The Court first notes that plaintiff's response to defendant's motion for summary judgment does not dispute that these services exist. Instead, plaintiff simply disputes the extent to which the state services are more "significant, substantial or valuable" when considered in relation to tribal services.[13] Secondly, and more importantly, the Court's statement

[13] Plaintiff's Response to Defendant's Motion for Summary Judgment at 5 (Doc. 59).

regarding state services on and near the reservation was collateral to its actual holding.

In granting defendant's motion for summary judgment, the Court ruled that the state was not preempted from imposing its own fuel tax on fuel sold at the Nation Station. The Court determined that the evidence favoring the state's interest in imposing the motor fuel tax was so one-sided that the defendant was entitled to prevail as a matter of law. The Court's holding was largely premised on the fact that the state fuel tax was imposed on the sale of non-Indian products to non-Indian consumers.[14]

In reaching this conclusion, the Court noted that the legal incidence of the Kansas motor fuel tax undisputably falls on non-Indian distributors.[15] In addition, the Court rejected plaintiff's contention that fuel sold at the Nation Station was an Indian product because the tribe operates a casino in close proximity to the Nation Station. Finally, the Court noted that while the legal incidence of the tax falls on the distributors, the ultimate burden of the tax falls on consumers, the majority of which are non-Indian and are provided governmental services by the state off the reservation. The Court's statement regarding state services on and near the reservation was simply an attempt to reveal that the small number of fuel purchasers who live or work on the reservation receive some state services. Thus, the Court finds this is not an issue that

[14] *Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1308 (D.Kan.2003).

[15] *See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 580 (10th Cir.2000) (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

requires this Court to correct clear error or prevent manifest injustice.

Plaintiff's second request in its motion for reconsideration is that the Court make a ruling finding that the plaintiff has a constitutional and federal self-government right to impose tribal taxes with respect to motor fuel sold on the reservation. It is clear from the Court's order granting summary judgment that such a ruling has already been made. In its order, the Court found that "[t]here is no question that the Tribe's power to tax transactions occurring on trust lands 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law. . . .'"[16] The Court further found that despite plaintiff's right to tax transactions on reservation land, the tribe cannot "oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business."[17] Thus, the Court ruled in accordance with plaintiff's request, and there is nothing to reconsider.

Plaintiff's final request is that the Court reverse its judgment and enter judgment for plaintiff. The Court finds that plaintiff fails to proffer any grounds or argument justifying reconsideration. At best, plaintiff's motion merely rehashes arguments previously considered and rejected by the Court.[18] As such, the Court declines to

[16] *Prairie Band Potawatomi Nation,* 241 F.Supp.2d at 1311 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

[17] *Id.*

[18] *See Resolution Trust Corp. v. Greif,* 906 F.Supp. 1446, 1456-57 (D.Kan.1995) (noting a motion to reconsider is not a mechanism to raise

(Continued on following page)

revisit settled issues. In sum, plaintiff has not presented any instances of manifest error or mistake warranting reconsideration of the Court's prior ruling. Plaintiff's motion shall be denied.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) is denied.

arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court).

United States Court of Appeals
Tenth Circuit.

AUG 11 2004

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION,

Plaintiff-Appellant,

v. No. 03-3218

STEPHEN S. RICHARDS, Secretary of the Kansas Department of Revenue,

Defendant-Appellee,

WINNEBAGO TRIBE OF NEBRASKA, HCI DISTRIBUTION, THE KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS, THE IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE SAC AND FOX NATION OF MISSOURI,

Amici Curiae.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 99-CV-4071-JAR)

David Prager, III, Tribal Attorney, Prairie Band Potawatomi Nation, Mayetta, Kansas, for Plaintiff-Appellant.

John Michael Hale, Special Assistant Attorney General, Kansas Department of Revenue, Topeka, Kansas, for Defendant-Appellee.

Vernle C. Durocher, Jr., Mary J. Streitz, and Christopher R. Duggan of Dorsey & Whitney LLP, Minneapolis, Minnesota; Thomas E. Wright of Wright, Henson, Somers, Sebelius, Clark & Baker, LLP, Topeka, Kansas; and Mark Hubble, Tribal Attorney, Winnebago Tribe of Nebraska, Winnebago, Nebraska, for Winnebago Tribe of Nebraska and HCI Distribution; Ilse L. Smith, P.C., Kansas City, Missouri, for Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Mark S. Gunnison of Payne & Jones, Chartered, Overland Park, Kansas, for Iowa Tribe of Kansas and Nebraska; and Thomas Weathers of Alexander, Berkey, Williams & Weathers LLP, Berkeley, California, for the Sac and Fox Nation of Missouri in Kansas and Nebraska, submitted a brief for amici curiae.

Before LUCERO, McKAY, and HARTZ, Circuit Judges.

McKAY, Circuit Judge.

This case addresses whether federal law prohibits Kansas from collecting its state tax on fuel supplied to an Indian tribe by a non-Indian distributor. Prairie Band Potawatomi Nation (the "Nation") sought to invalidate the fuel tax on grounds that it is preempted by federal law and that it infringes on the Nation's rights of self-government. The district court granted summary judgment for the Secretary of the Kansas Department of Revenue (the "Secretary"), and the Nation brought this appeal.

Facts

The following facts are undisputed. The Nation is a federally-recognized Indian tribe whose reservation is on United States trust land in Jackson County, Kansas. Aplt. App., Vol. I, at 35. On its reservation, the Nation financed, constructed, and now owns and operates a $35 million casino. *Id.*, Vol. II, at 70. By building this casino, the Nation increased the number of people who travel to this otherwise remote and rural area. *Id.* at 70-71. To accommodate casino patrons and other reservation-related traffic, the Nation financed and built a gas station (the "Nation Station") which is close to the casino and on the same federal trust land. In building the Station, the Nation incurred $1.5 million in construction costs, which included the purchase of a motor fuel handling system with tank storage and monitoring systems to make fuel available to customers. *Id.*, Vol. III, at 22. The Nation Station is tribally-owned and operated, and, as of May 2000, eleven of its fifteen employees were Indians, with seven of those being Nation tribal members. *Id.* at 2-3. The Nation submitted expert testimony, which the Secretary does not dispute, that "the 'value marketed' by [the] Nation Station results from the business generated by the casino and from employees of the casino and [the Nation's] government and residents." *Id.*, Vol. II, at 86. This conclusion is supported by the undisputed evidence that seventy-three percent of the Nation Station's fuel customers are casino patrons and casino employees and another eleven percent live or work elsewhere on the reservation. *Id.*; *Id.*, Vol. V, at 46; Aple. Br. at 5. The Nation's expert also reported that the Station is a location-dependent business because, "[b]ut for the casino, there would not be enough traffic to support [it] in its current location." Aplt. App., Vol. II, at 86. The Nation Station sells fuel at fair market

prices. Therefore, it cannot and does not advertise an exemption from state fuel taxes. The Nation's expert concluded that "the Nation is not 'marketing a tax exemption' because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market." *Id.* at 84. The Nation also submitted two affidavits – one from the Station's manager and one from the Nation's Treasurer and Tax Commissioner – that support this conclusion. *Id.* at 71; *Id.*, Vol. III, at 161. The Secretary has not controverted the Nation's expert opinion or the Nation's affidavits and does not argue that the Nation sells fuel below market prices.

The Nation imposes a tax on the Station's fuel sales: 16 cents per gallon of gasoline and 18 cents per gallon of diesel (increased to 20 cents for gasoline and 22 cents for diesel in January 2003). Aplt. App., Vol. IV, at 207; Vol. V, at 169. The Station provides the Nation with its sole source of fuel revenue, which amounts to about $300,000 in tribal fuel taxes each year. Aplt. App., Vol. III, at 3. Pursuant to the Nation's Motor Fuel Tax law, this fuel revenue is used for "constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation." *Id.*, Vol. IV, at 208. This includes maintenance on the road that connects the United States Highway 75 to the Nation's casino. The Nation receives no financial assistance from Kansas to maintain this stretch of roadway.

Discussion

In this dispute, the Nation challenges the 1995 amendment to the Kansas Motor Fuel Tax Act. Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997). Pursuant to this

amendment, the Kansas Department of Revenue began collecting, for the first time, a tax on motor fuel distributed to Indian lands. The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors. Kan. Stat. Ann. § 79-3408(c); *Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 580 (10th Cir.2000). But, the distributors are allowed to pass the tax directly to retailers, like the Nation Station. Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as part of the selling price.") The Nation brought suit to enjoin the Secretary from imposing the tax on the Nation's fuel, and the district court granted summary judgment for the Secretary. We review a district court's grant of summary judgment *de novo* to determine whether there is a genuine issue as to any material fact and whether a party is entitled to judgment as a matter of law. *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1175 (10th Cir. 2001); *Sac and Fox,* 213 F.3d at 583.

The Nation asks us to invalidate the tax as it applies to the Nation's fuel under two independent but related doctrines. First, the Nation argues that federal law preempts the tax because federal and tribal interests against state taxation outweigh Kansas' interests in imposing the tax. Second, the Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government. Either of these doctrines would be sufficient to invalidate the Kansas fuel tax as applied here. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

We first address whether the tax is preempted by federal law. The constitutional source of federal preemption is Article I, Section 8, Clause 3, which provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." When preemption analysis is applied to Indian cases, we consider the unique origins of tribal sovereignty and how it differs from state sovereignty. *Bracker,* 448 U.S. at 143. Specifically, "[a]mbiguities in federal law have been construed generously in order to comport with [the] traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143-44 (citing *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174-75, and n.13 (1973)). "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertions of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).

In cases like this – where a tribe is challenging a state tax – "[t]he initial and frequently dispositive question . . . is who bears the legal incidence of a tax." *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy. . . ." *Id.*

Although the Secretary argues that the balancing of interests test should be abandoned, citing Justice (now Chief Justice) Rehnquist's partial dissent in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 176-80 (1980), circuit precedent requires us to use this balancing test. *See Sac and Fox,* 213 F.3d at 583. The balancing test is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker,* 448 U.S. at 145.

Applying these principles, we conclude that the Kansas tax, as applied here, is preempted because it is incompatible with and outweighed by the strong tribal and federal interests against the tax. The Nation's interests are particularly strong. Tribes have a recognized "interest in raising revenues for essential governmental programs, [and] that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville,* 447 U.S. at 156-57.

Here, the Nation's fuel revenues are derived from value generated primarily on its reservation. In determining reservation value, the unique facts of this case require us to look beyond the physical fuel (the Nation receives its fuel in "ready to sell" condition) and to view the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 219-20 (1987) (balancing tribal and state interests by examining the bingo enterprise as including the facilities and ancillary

services offered to patrons); *Bracker,* 448 U.S. at 145-51 (weighing the tribe's general economic interest in its timber industry to invalidate a state motor carrier license tax and a use fuel tax applied to non-Indians doing business with the tribe); *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n,* 829 F.2d 967, 986 (10th Cir. 1987) (weighing the tribe's interest in its bingo enterprise as a "form of entertainment"); *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1410 (9th Cir. 1992) (weighing the state interests in taxing tickets to on-reservation events and concessionary items against the tribes' "involvement in the production of the entertainment events which take place on its reservation").

The close nexus between the Nation's fuel sales and its gaming enterprise is critical to our analysis here. When we recently reviewed the Kansas fuel tax as it applied to a tribe's retail station alone, we held that "the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value 'generated on the reservations by activities in which the Tribes have a significant interest.'" *Sac and Fox,* 213 F.3d at 585 (quoting *Colville,* 447 U.S. at 155) (remanding to develop an adequate record to balance tribal and state interests). There, we also held that we would not invalidate the state tax solely on the ground that it would decrease tribal sales to non-Indians, particularly where the tribes' "fuel market exists only because of the Tribes' claimed exemption from the [state] fuel tax." *Id.* Here, in contrast, the Nation's fuel sales are derived from value generated on its reservation because its fuel marketing is integral and essential to the gaming opportunity the Nation provides. Also, unlike in *Sac and Fox,* the Nation's fuel market does not exist because of a

claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities. This is clear from both the undisputed expert testimony that the Station's fuel market only exists because of the Nation's casino and from the undisputed fact that seventy-three percent of the Station's fuel patrons are casino patrons and employees. For these reasons, we balance the competing interests by viewing the Nation's fuel revenues as being derived primarily from value generated on its reservation.

In balancing the interests, both the district court and the Secretary heavily relied on *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), to conclude that Kansas' interests in taxation outweigh the competing federal and tribal interests. Aplt. App., Vol. V, at 64-65; Aple. Br. at 30-31. In *Colville,* the Court upheld state taxes applied to on-reservation retail sales of cigarettes and tobacco products because "[w]hat the smokeshops offer . . . is solely an exemption from state taxation." *Id.* at 155. "It is painfully apparent," the Court said, "that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* The Court then validated the state tax, holding that "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

We distinguish *Colville* in two critical ways. First, in stark contrast to the smokeshops in *Colville,* the Nation is not marketing an exemption from state taxes. The undisputed

evidence is that the Nation sells its fuel at fair market prices. Aplt. App., Vol. II, at 71, 84; Vol. III, at 161. Thus, a central component to the reasoning of *Colville* is inapplicable here.

Second, unlike in *Colville,* the Nation is not merely importing a product for resale to non-Indians; rather, the revenues from the Nation's fuel to non-Indian consumers are derived from value "generated on the reservation [] by activities in which [the Nation has] a significant interest." *Colville,* 447 U.S. at 155. It is undisputed that when the Nation financed and built its $35 million casino to attract non-Indian patrons, it created a new fuel market for an otherwise remote area. After creating this new market, the Nation financed and built the Station to offer fuel to its casino patrons and other reservation-related traffic.

The Supreme Court has acknowledged this second distinction when it distinguished *Colville* where tribes "are not merely importing a product onto the reservations for immediate resale to non-Indians" but have created an entertainment enterprise designed to attract non-Indian consumers onto its reservation. *Cabazon,* 480 U.S. at 219. In *Cabazon,* the Supreme Court held that the federal and tribal interests outweighed state interests in regulating bingo and other games because, unlike in *Colville,* the tribes have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. *Id.* As in *Cabazon,* the Nation built a modern casino and ancillary services, like

the Nation Station, in order to offer its patrons an attractive entertainment opportunity. Here, seventy-three percent of the Nation Station's fuel customers are casino patrons and employees. Aplt. App., Vol. II, at 86. These patrons, like those in *Cabazon,* spend extended amounts of time using the entertainment services offered by the Nation. Thus, the Nation's fuel revenues are derived from activities – that is, drawing non-Indians to its gaming enterprise – in which the Nation has a significant interest.

The Nation's interests here are strengthened because of its need to raise fuel revenues to construct and maintain reservation roads, bridges, and related infrastructure without state assistance. It is undisputed that the Nation's only source of fuel revenue comes from the Nation Station. *Id.,* Vol. III, at 3. Fuel revenue is typically used to pay for a government's infrastructure expenses, and, in this case, the Nation's Motor Fuel Tax law specifically requires that all fuel revenue (approximately $300,000 per year) be used for "constructing and maintaining roads, bridges and rights-of-way located on or near the reservation." *Id.,* Vol. IV, at 208. The Nation has the financial responsibility for the majority of the roads and bridges on and near its reservation. *Id.,* Vol. III, at 22-23. Of particular importance here, the Nation has an ongoing and future responsibility to maintain the stretch of roadway that connects the United States 75 Highway (the main highway leading to the reservation) with the casino. *Id.* at 23. "The Nation spent approximately $1.2 million in 1997 and 1998 to improve and pave 1 1/2 miles of 150th Road from the casino to U.S. 75 Highway and to make major improvements to the 150th Road and U.S. 75 Highway intersection." *Id.* Thus, the Nation used its fuel revenues to provide better access from the main federal highway to its

casino. Kansas does not contribute funds to cover the costs of maintaining this access road.

The Secretary argues that the Nation could continue collecting fuel revenues from the Nation Station by imposing its tax in addition to the state tax. But the Nation's expert explained that this is not economically feasible. He reported that [b]asic economic theory teaches that the [Nation Station] cannot charge prices high enough to allow collection of both the Kansas and [the Nation's] fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Nation Station's] fuel business to virtually zero. Aplt. App., Vol. II, at 89. The Secretary has not submitted contradictory evidence and has not argued that this opinion is either incorrect or exaggerated. The "economic realities of the situation [] both in the presence and absence of the motor fuel tax" are relevant in balancing the competing interests. *Sac and Fox,* 213 F.3d at 585; *see also Colville,* 447 U.S. at 157-58 (noting that a tribe bears the burden of showing that its smokeshop businesses would be significantly reduced absent a credit for tribal taxes paid). This economic reality adds to the Nation's already strong interests against taxation.

The Nation's interests in this case are aligned with strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments. These federal goals are stated in numerous Acts of Congress, Executive Branch policies, and judicial opinions. *See generally* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, § 2704(4) (2001); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2001); Indian Self-Determination

and Education Assistance Act of 1975, 25 U.S.C. § 450f (2001); *see also* Presidential Proclamation 7500 of November 12, 2001, 66 Fed. Reg. 57641 (Nov. 15, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Presidential Executive Order 13175, 65 Fed. Reg. 67249, Consultation and Coordination With Indian Tribal Governments, § 2(c), (Nov. 6, 2000) ("[T]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."); *Bracker,* 448 U.S. at 143-44 (noting "a firm federal policy of promoting tribal self-sufficiency and economic development" as evidenced by various congressional enactments); *Colville,* 447 U.S. at 155 (recognizing "varying degrees [of] congressional concern with fostering tribal self-government and economic development").

Against these strong tribal and federal interests, the sole interest Kansas asserts is its general interest in raising revenues. Of course, states have a "legitimate governmental interest in raising revenues, and that interest is . . . strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville,* 447 U.S. at 157. Here, Kansas' interest is not at its strongest. The tax is directed at fuel which, under the particular circumstances of this case, is derived primarily from value generated on the reservation. Also, Kansas does not provide any financial assistance in maintaining the access roadway from the United States 75 Highway to the casino. The ongoing and future obligation to upkeep this stretch of roadway is exclusively the Nation's, and the Nation's only source of fuel revenue (which is designated for this obligation) comes from the Station.

Under these facts, Kansas' generalized interest in raising revenues is insufficient to justify its tax.

Therefore, we invalidate the Kansas Motor Fuel Tax as it applies to the Nation's fuel because the balance of tribal, federal, and state interests prohibits state taxation as a matter of law. Although Kansas has a legitimate interest in raising revenue, this general interest is insufficient to justify the tax under these particular facts because it interferes with and is incompatible with strong tribal and federal interests against taxation.

REVERSED.